No. 2261

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

[redacted]

Appellant,

vs.

[redacted]

Appellee.

REPLY BRIEF FOR APPELLANT.

F. B. McCormick,

S. H. Dent,

Attorneys for Appellant.

[redacted] day of December, 1913.

FRANK D. MONCKTON, Clerk.

By [redacted] Deputy Clerk.

FILED

[redacted]

No. 2251

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY
(a corporation),

Appellant,

vs.

UNITED ENGINEERING WORKS
(a corporation),

Appellee.

REPLY BRIEF FOR APPELLANT.

"Facts of the Case."

(Appellee's Brief, pp. 1-17.)

Counsel prefaces this heading by saying that against appellant's claim *"their exists a presumption arising from the findings of the District Court"*. In our opening brief we had not deemed it appropriate to make more than necessary references to the trial court's connection with this case. Frequent unnecessary references, however, to the matter in appellee's brief, as well as references to it in oral argument, force us

to take notice that we may correct counsel's pretended conception of the law relative thereto. This court has frequently recognized the principle that in admiralty cases, unless the trial court had advantages not possessed by the appellate court, its findings of fact raise no presumption one way or another, the appeal under such circumstances being practically a trial de novo, The principle has received, we believe, the approval of all courts reviewing admiralty appeals, and has but recently been re-enunciated in *Hamburg-Amerikanische Packetfahrt A. G. v. Gye,* 207 Fed. 247, 253, where it is said:

> "While we recognize the rule that the findings of fact in admiralty causes by the district court are entitled to great weight by the appellate court, the reason for the rule is based upon the trial court's opportunity for judging the credibility of the witnesses; the reason for the rule ceases, however, when the trial court's finding is based, as it was in the present case, on depositions."

The frequent references to these "presumptions" made by one of counsel's known experience in admiralty practice must be looked upon with no little surprise.

In replying to appellee's discussion of the "*facts of the case*" our purpose is to be brief as shall be consistent with a complete reply for, while there are few, if any, points under this head of any great materiality, still, the aggregate of statements of comparative unimportance seems to warrant the expenditure of the time necessary to correct them so that they may conform more fairly to the record.

Charges of Collusion and Fraud.

Assertions are frequently made that our defense rests upon charges of *"collusion and fraud"* (see inter alia, pp. 2, 3, 16 and 22 of brief). The only warrant for them arises out of our discussion of the duplicated one hundred hours of time on smokestack work shown on Putzar's sheet No. 42. Of this duplication we say:

> *"If Curtis, with knowledge of the smokestack agreement embodied in Schedule 9 of the libel, passed the smokestack time cards over to Putzar, and Putzar with the same knowledge approved of them as an appropriate charge to be made against the Matson Navigation Co., in addition to the smokestack charges embodied in Schedule 9, then, we have nothing to say to such a fraudulent collusion."*

We submit that these words are appropriately couched and need no defense. If there be *"charges"* of fraud and collusion, other than this hypothetical one, they do not find expression in any words of ours and, therefore, are born of inferences drawn by counsel from our statement of the facts. We do not ask the court to follow counsel in these inferences for, in our view, appellant's case stands in no such need.

Captain Matson Arbitrary and Impetuous.

(Brief, pp. 3, 7.)

It seems appropriate when the character of one's client is improperly and falsely reputed in a quasi public document, such as a printed brief, that, irre-

spective of his position in public life, such false repute should be appropriately denied. In this case it was beside the issue for the statements to have been made and, even at the risk of incurring displeasure in discussing an immaterial issue, we feel drawn to do so out of respect for the truth if nothing more. First let us repeat the statements:

At p. 3 we find:

> "Nor in what follows do we desire to cast reflection upon Captain Matson, *who was always known to be arbitrary and impetuous,* but with whom nevertheless the United was able amicably to do business for so long a period of time."

And again at p. 7:

> "Mr. Gray, who it will appear, was as solicitous for Captain Matson's interests as for his own, and knowing Captain Matson's disposition *(which the parties admit is arbitrary and somewhat impetuous, as also appears from his manner of testifying)* was very much worried about the increased expense (Klitgaard VII, 2010) and desired to curtail it."

The italicized portions of both these quotations are ours, and they not only fail of substantiation in the record, but are in themselves false and unfair. The only possible basis for these gratuitous remarks appears on the first page of Heynemann's book of sketches (not printed) introduced as "Libelant's Exhibit Heynemann No. 3", where Mr. Heynemann, in purporting to set down a conversation had with Captain Matson's counsel wrote: "Told him I was a shop man and rather sympathized with the U. E. Works and had found Mat-

son very arbitrary." This is the only record matter to support the statement that Captain Matson *"was always known to be arbitrary and impetuous,"* and the further one that his disposition is *admitted by the parties to be "arbitrary and somewhat impetuous"* (see cross examination Heynemann, VI, 2183-2185). When the attempt is made to fortify this latter statement by an appeal to the witness's manner of testifying, it should have been apparent that the proprieties were being grossly abused. In placing before this court a biased interpretation of a witness's character, *as shown by his words under cross examination,* no counsel adds to his dignity, for such a course is usually resorted to in appeals to jurors where the manner of the witness in giving his testimony has been seen by all.

We will now briefly answer such further of appellee's remaining *"facts of the case"* as we deem at this time necessary.

(a) The *unqualified* statement found in the opening sentence of the second paragraph on page 4, that the bids of August 2nd *"were again rejected by Captain Matson",* finds no support except in the testimony of Mr. Gray. Both Matson and Saunders say the bid of the *United* of that date *was* accepted.

(b) The statement in the paragraph just referred to, to the effect that Matson proposed Putzar as timekeeper, is not in accord with the record. Putzar was unknown to Captain Matson, and Mr. Gray himself

admits that he suggested his name. On direct examination he is asked by his counsel if he had made any suggestion to Captain Matson as to who the timekeeper should be, and he replied that he suggested three men and, after naming two of them, Mr. McClanahan interrupted the examination by asking who the third was and the witness replied:

> "Well, that was Putzar."
>
> (VII, 2346-2347.)

(c) At page 5 of the brief the statements are made that

> *"the work had not progressed very far when it was ascertained that the specifications would not answer the purpose intended."*
>
> *"Repeatedly during the progress of the work along the line of a particular item of the specifications, after preparations had been made and the work had progressed along that line, and parts of the vessel torn out, that line of work had to be abandoned and other and different work substituted."*

As to the first, that the specifications were found deficient, if counsel means that they were abandoned, we simply reply that there is not a word in the record to substantiate such a statement. Both Klitgaard and Kinsman testified that the specifications were followed all through, with the exception of the agreed compensation and substitution work, and appellee's own witness Siverson testified to the same effect:

> Q. Now Mr. Siverson, you had these specifications with you right along as the work went on, didn't you?

A. I had a set of the specifications.

Q. And worked according to the specifications, did you not, in the particulars where the specifications were carried out?

A. Well, really the specifications were consulted—when any particular line of work came up that was called for by the specifications, Mr. Klitgaard and Mr. Putzar would be called and their opinion would be asked regarding so and so, in which manner they wanted it done.

Q. And it would be done in that way?

A. It would be done in that way.

(IV, 1117.)

While Mr. Gray, when asked if the specifications which were originally given to the workmen were retained until the job was finished, said:

A. They certainly would be until the job was finished.

Q. They worked under them?

A. Yes.

(VII, 2438.)

As to counsel's second statement relating to the abandonment of specification work after it had been once commenced, we confidently assume that in making reference to the testimony of "Siverson III, pages 1090-3", counsel has selected the strongest evidence which the record affords to support the statement. Therefore, an examination of this reference was sought by us with great interest, for not to our recollection had the record ever hinted at such a showing as contended for. In this part of Siverson's testimony we do find the witness making a *general* statement that would in a *general* way lend color to counsel's assertion,

but the only instance which he is able to or does cite as illustrative of the matter destroys entirely the value of his general statement, for the illustration is that of the spring bearings, reference to which was made in our opening brief (pp. 168-169), and will be again referred to later on in this reply brief.

We challenge counsel to point to a *"particular item"* of the specifications, or any part thereof, that the record shows was ever commenced and then *"abandoned and other and different work substituted"*. Of course, the court recognizes the difficulty of meeting a sweeping assertion, such as is here made, other than by a general denial. In all fairness if there be in the record any support for the statement it should be specifically pointed out. Reference to Siverson's testimony does not meet the required proof.

(d) At the top of page 6 it is asserted that the contention of appellant is that it was to receive a credit from the upset price of the contract if the crankshaft was not removed, and that *this contention is denied by the United.* As the testimony of all who participated in the crankshaft controversy is in perfect accord on this subject of a credit in case of its non-removal, we cannot understand counsel's reference to this as one of the disputed points of the case, except on the ground of forgetfulness of Mr. Gray's testimony on the point which we refer to in our opening brief on at least two occasions (pp. 141, 175). Surely it cannot be said that counsel's effort to nullify the effect of this testimony of Gray's (see opening brief,

pp. 147-148) is warrant for the present assertion of a difference of contention between the parties on the point.

(e) At page 6 is cited, as an analogy to appellee's contention as to the treatment of the bid of August 2nd, Captain Matson's rejection of Gray's bid on the tank top work. In the first place, if the larger specification repair work was being done on a quantum meruit, as contended for by the appellee, it certainly is significant in refutation of such contention that Matson should have called for a bid on this comparatively smaller work. Such a situation could fairly be likened to the incongruous case of a man authorizing his builder to make extensive repairs to his house on a time and material basis, and then, during the work, seeking from him a contract at a fixed figure for repairs to his cellar door. The truth of the matter is that, in all cases of consequence, coming under Captain Matson's observation, he invariably required from the United a fixed price for the work, and the tank top was no exception aside from the fact that he rejected the bid of $1250, and preferred to run his chances on a time and material basis (Klitgaard, VI, 1947). The record shows that practically all dealings with the United in the matter of the "Hilonian" repair work was the subject of a special contract at a fixed price. Note the separate minor contracts covered by Schedules 4 to 10 of the libel (Klitgaard, VI, 1939-1945), and also the three prior contracts: Re-tubing the donkey boiler; installing an independent circulating pump, and the

work done on the Howden force draft system (id. VI, 1945-1946).

Referring specially to the contract covering the five spring bearings (Schedule 4 of the libel), it will be remembered that the original specifications contained this provision:

> *"Should spring bearings require remetalling a separate price will be allowed for each."*
>
> (Christy's Exhibit C, VII, 2656.)

They did require remetalling and, in accordance with this provision of the specifications, a separate price was agreed to between Gray and Klitgaard (Klitgaard, VI, 1939; Gray, VII, 2449), which was subsequently embodied in Schedule 4 of the libel. Why, may we ask, did the parties find it necessary to agree to a separate price for this work if the contract for the balance had been *"turned down"*, and the whole job was to be done on a time and material basis? This remetalling of these five spring bearings at a *"separate price"*, agreed to after the necessity for the remetalling became apparent, and during the progress of the specification work, is indisputably contemporaneous evidence in proof of the recognition by both parties that the specification work was being carried out under Captain Matson's acceptance of the bid of August 2nd. We can think of no other possible construction to place upon this act of the parties. It is as significantly destructive of Mr. Gray's contention that appellee's bid of August 2nd was *"turned down"* as anything well could be, and in this connection we wish to refer

to counsel's statement found under another head of his brief:

> "The contract, therefore, under the specifications, as originally entered into, was to remetal *two* spring bearings, and it was afterwards changed by requiring remetalling of the other three that under the original agreement had been prepared for placement without remetalling."
>
> (Brief, p. 47.)

Will appellee favor the court with *specific* reference to that portion of the contract *"under the specifications as originally entered into"*, whereby the remetalling of but *two* of the spring bearings was called for? And will it also point to the testimony showing the subsequent change in this agreement whereby the remetalling of the *remaining three* was agreed to? In complying with this latter, appellee will appreciate the futility and inappropriateness of making reference to any but the testimony of Klitgaard and Gray, the men who made the spring bearing agreement subsequently to the contract under the specifications.

We do not wish to be understood as contending that no work on the "Hilonian" was done other than at agreed prices. Our experts show that over $6000 worth was done, to which they arbitrarily added $2000 as a bonus covering possible overtime and other unforeseen contingencies. But this was evidently work which was uncovered in the doing of the specification work and, although it amounted to considerable in the aggregate, it was comparatively insignificant in the detail (with the exception of the tank top work), and

we surmise it was not thought of sufficient importance as each item was discovered to call for a separate price. Furthermore, we suggest that it was this character of extra work that called for Gray's protest:

> I told him (Klitgaard) that they were getting themselves into a hole, that they were not going to get out very easily. Matson was out of town at that time and they had better stop finding any more work on the ship. * * * I told them that they had better stop finding any more work, that they would get into serious trouble with the owner of the ship.
>
> (VII, 2381.)

These remarks of Gray also are more compatible with appellant's contention of a contract than appellee's that there was none, and it is well to suggest that the predicted trouble arose through appellee's refutation of its contract and not through the "finding (of) any more work" on the ship, for the new found work referred to was provided for *without protest* in the check for $22,922.56 tendered the appellee before appellant's answer was filed.

(f) Next, counsel takes up the subject of appellant's tender on November 24, 1909 (V, 1631), of a check for $15,500 (improperly stated in our opening brief as for "some $20,000", p. 5), which included the original contract and "sundry bills" (V, 1751; Matson, V, 1741; Curtis, V, 1628-1631). The fact of this tender having been made to cover the contract for $11,749, and its rejection, is undisputed. From this, then, there will be noted two important facts. First,

an insistence on the part of appellant of the existence of the contract of August 2nd, and second, a tender of the full amount called for by that contract as early as November 24, 1909. The last fact bears strongly on the question of appellee's right to ~~insist~~ interest on the contract price of $11,749.

Before leaving this subject of tender, we are forced again to correct counsel in a statement of fact. It is said that this tender was a result of telegrams between Matson in the East and his San Francisco bookkeeper, and was made under Captain Matson's orders, *"though at the time he had not seen the bills nor did he know anything about the facts."* We are unable to verify by the record this latter statement. Captain Matson was in the East at the time of the receipt of a telegram from Gregg, the secretary of the company, stating that he had made a check to the United covering the contract on the "Hilonian" and sundry other bills, which was refused unless shown to be on account (V, 1751). This surely would hardly authorize counsel's statement that *"at the time he had not seen the bills nor did he know anything about the facts."*

(g) There is no need to consume any time over appellee's discussion of Putzar's time sheets and his *"hand book"* as found at pp. 8 to 10 of the brief, other than to remark the calm assurance with which counsel says that "Putzar's pocket book was a mere memorandum, and the exhibit referred to (the time sheets) was the permanent form into which *it was transferred."* That Curtis's testimony should be referred to in sub-

stantiation of this statement adds nothing to its verity, for Curtis's lack of knowledge of the contents of Putzar's "hand book" has been fully shown in our opening brief (pp. 85-98).

(h) Counsel refers to appellant's refusal to check up appellee's bill both before and after suit, "*in order to place the court in possession of the attitude assumed by the respondent towards this dispute*", and also that "*the same disposition was disclosed in the statement of the pleadings*". Several pages are then consumed in an effort to point out the unfair and ungenerous conduct of appellant along these lines. As to the United's offer to check up the bill before suit, Curtis says this was an offer to check it "*for any clerical errors*" (V, 1531). As to the offer to check it up when the United "*started taking testimony*", we find such offer couched in these words:

> *Now, if there is any portion of this bill that you are ready to concede,* so that we can prove that which you contest, why, I would be very glad to cut down the entire examination.
>
> (I, 166.)

Counsel seemed at the time this remark was made to be oblivious of the fact that *we had already* admitted the minor contracts of the libel, Schedules 4 to 10, and as to Schedules 1, 2 and 3, had definitely and specifically made admission of all the work done by the "United" known to us (I, 64-71). It was quite natural therefore that appellee should be put to its proof of the material and labor charges under Schedule 1 claimed to have been furnished under a quantum meruit.

In view of the paramount issue in this case touching the question of a contract, can it be suggested how it would be possible, without waiving our entire claim, to admit the material and labor and its value as shown by Schedule 1, which according to our claim is compounded of quantum meruit and contract items? As we have shown, the segregation of this schedule was requested by us before suit and refused,—was it incumbent, then, upon appellant after suit to perform this duty for appellee? Counsel seems further unmindful of the fact that just so long as one party maintains and the other disclaims a contract there could have been no "*checking up*" that would have had a mutually beneficial result. Appellant, in admitting the rates of labor on appellee's bill to be correct (IV, 1346, 1347), went as far as it possibly could and still preserve its contention as to the contract. It will also be remembered that we admitted the furnishing of the material set forth in Schedule 2 and the first part of Schedule 3 (IV, 1322), and the *value* of the material shown on these schedules (IV, 1329). The second part of Schedule 3 was an admitted duplication and was withdrawn by the appellee (IV, 1329, 1330).

(i) *The Hough incident.* We desire to say at the outset that, if the court should find that the record supports counsel's charge that the appellant acting through Mr. Diericx subsidized Mr. Hough "*not to render any services to the libelant in case the libelant should apply to him*", any words of disapproval of such conduct shall meet our hearty acquiescence, and furthermore, for any attorney practicing before this

or any court to lend himself, either actively or passively, to his client's conduct in securing the co-operation of a prospective witness by bribery (which is our understanding of counsel's meaning when he uses the word "subsidized"), stamps him as unfit both morally and ethically to pursue his profession. At the hearing we looked upon the matter as being on a par with the tactics of some practitioners in the handling of a jury trial where the incident, admittedly having no bearing on the merits of the case, is elucidated for the purpose of the effect on the mind of some possible man in the jury box. Had we known or suspected that it was going to be used in this case as the basis of a charge of a species of bribery, we certainly would have gone into the matter further by calling Mr. Diericx for substantiation of our understanding of Mr. Hough's retainer, an understanding hinted at in the following question put to the witness:

> Q. Subsequent to this request to make the estimate and your declination of it, is it not a fact that Mr. Diericx gave you a retainer and by the payment of that retainer required your advice in special matters connected with this case not involving an estimate on the work necessary. In other words, did you not obligate yourself to be at the disposal of Mr. Diericx or the Matson Navigation Co. in certain matters that did not involve the making of an estimate in connection with this case?
>
> (IV, 1378.)

Although Mr. Hough's immediate answer to this question was: "I do not think that is so", and again: "I do not think that was very clearly set forth, Mr.

McClanahan", still, we submit that as the witness emphatically states that his understanding of the matter was that the retainer was given to secure his *"neutrality"* or *"hands off"* (IV, 1377, 1379), his subsequent admission that, if called upon by the Matson company to render an expert opinion on the use of the bending slab, or any similar proposition, he would have done so (id. 1379); greatly modifies his positive statement as to his remembrance or understanding of the reason for the retainer. In fact, his subsequent testimony clearly intimates that the suggested services might have been the purpose of the retainer:

> Q. Did not Mr. Diericx mention to you the possibility of requiring your advice on certain matters that would not involve the estimate of the value of the work?
>
> A. *He may have done so, if he had reminded me of that condition,* and had come with a suggestion as you propose in regard to a bending slab, I would have done my best to give him an answer.
>
> (IV, 1380.)

Furthermore, our contention that Mr. Hough was not subsidized *"not to render any services to the libelant in case the libelant should apply to him"* finds additional support in this testimony:

> Q. Going back again to the time when you received a retainer from the Matson Navigation Co., did you have a talk with any one besides Mr. Eva, subsequently connected with the United Engineering Works?
>
> A. Yes, sir.
>
> Q. With whom?
>
> A. Mr. Curtis.
>
> Q. What was the conversation and when was it?

A. Mr. Curtis called on me; it would be about ten days ago.

* * * * * * *

Q. What did Mr. Curtis want with you?

A. He asked me if I would certify to the conditions of time as worked in this city for some time back in 1906 or 1907, from that time on.

Q. That is the labor conditions here?

A. Yes, sir.

Q. What did you say to that request?

A. I said I thought I could do that.

Q. What else was said?

A. That was all.

* * * * * * *

Q. You made no protest to Mr. Curtis in the matter?

A. No, sir, not to Mr. Curtis.

Q. Yet you knew he was asking of you data to be used in this case?

A. I suspected so.

Q. And that data you have used in this case?

A. I have.

(IV, 1387, 1388.)

If Mr. Hough was bribed not to render any service to the appellee, then the joke is on the appellant for appellee used Hough, not only to establish the labor conditions under which the "Hilonian" work was performed, but also this witness furnished appellee affirmative proof of the value of the materials charged in Schedule 1 and, in anticipation of our use of expert testimony, he was used in anticipatory rebuttal to show the worthlessness of such evidence. Truly, counsel gives the appellant the name but he takes the game. But speaking seriously. How puerile this charge of subsidizing really is when one considers the futility of buying up *one* of a score or more of men of equal abil-

ity touching a matter so general, and where the merest embryo would know it to be impossible for the expert to remain bought because of the power of the process of this court. And lastly, *subsidizing* a man already determined, because of his friendship for both parties, to remain neutral anyway, is a misnomer.

> Q. Your evidence, as I understand it, clearly shows that you did intend to be neutral before you got the retainer?
>
> A. I have suggested that it was likely that had the United Engineering Works asked me to serve them it is likely that I would have excused myself.
>
> * * * * * * *
>
> Q. And that neutrality and that frame of mind existed before you accepted a retainer from the Matson Navigation Co.?
>
> A. Yes, sir, to a great extent. I felt friendly to both parties.
>
> (IV, 1380-1381.)

> Q. And if you felt that kindly feeling towards the United Engineering Works, why did you take a retainer from the other side?
>
> A. As I said before, neutrality, that is my word.
>
> Q. Why could you not preserve the neutrality without the retainer?
>
> A. You have pointed out it is a matter of business with me and was.
>
> (IV, 1411.)

Contract or Quantum Meruit.

(pp. 18-69.)

Appellee's reply brief under this head starts out with an admission of the correctness of the law cited

by us (opening brief, pp. 192-197), and a criticism of its application. The situation to which our cases are intended to apply can be viewed in a twofold aspect. In citing them we desired to show the situation where the original contract, calling for the removal of the crankshaft, was subsequently departed from by an oral agreement, with no mention made as to a credit on that account. In addition, we wished to show the situation where in performing the original contract, other work was subsequently mixed with it admittedly done without an agreement as to price.

As to the *"compensation"* work and work performed in a different way from that called for by the contract, but accomplishing the same purpose, we cite no law at all for the reason that we contend that these changes were mutually made without affecting the contract price of $11,749, making the issue as to such work purely one of fact, for the law under such circumstances is too well known to require citation. In our pleadings we make no mention of this *compensation* and *substituted* work, deeming the matter solely a question of proof which we would have to make in the establishment of our claim of a contract. The *"omissions, changes and modifications"* from the contract, made without agreement as to price, referred to in our answer (I, 47), and made so much of throughout counsel's brief, refer solely to the crankshaft, as is made perfectly apparent by the succeeding allegation:

> That the respondent is informed and believes, etc., that the just and reasonable value of the work and materials omitted as aforesaid by agreement

> of the parties from the original contract as aforesaid is the sum of $1398.25, and of the additional work and materials (not called for by the contract) furnished as aforesaid, the sum of $8280.50.
>
> (I, 48.)

Counsel's argument, therefore, on pp. 20 and 21, proceeds on a wrong hypothesis and, working along the line of this erroneous theory, we are told that our pleading "truly stated the facts with regard to those changes, but when he came to his proofs, he found it impossible to conform to the rule established by law and in order to '*force his balance*' (this seems to be a favorite expression of counsel) he advances the contention of substituted and compensation work." This statement, carrying as it does the charge (specifically repeated at p. 32 of the reply brief), that our contention of "compensation" work was a substituted afterthought, made *after the drawing of our answer,* is not supported by a single word of the record. Gardner and Heynemann gave to appellant their estimate of the value of the "Hilonian" work, and this estimate was used in preparing appellant's answer. Their work was based on the understanding of there having been an agreement covering this compensation and substituted work, entered into without affecting the price of the contract. Their entire testimony is based on this premise. Note the hypothetical statement of facts preceding the examination of both witnesses (Heynemann VI, 2019; Gardner VI, 2206); note Gardner's testimony (VI, 2215-2217) where he speaks of this compensation and substituted work and refers to the specifications, which

he had in his possession when estimating, showing it (Gardner's Exhibit 1, VII, 2662; VI, 2264, 2265); note that the testimony of both these witnesses pertaining to the 140 item list (Kinsman's Exhibit 2) recognized throughout this work which was not included in their estimate, because they were told it was compensation and substituted work under the contract; note that counsel himself admits this when he says:

> "The experts made no allowance whatever for these changes, but as already stated, treated them as if agreed upon by the parties as substitutions without further compensation."
>
> (pp. 22, 23.)

Furthermore, Klitgaard's report to the appellant, after the work was done and before thought of litigation, a copy of which was given to appellee, shows this compensation and substituted work (VII, 2700-2702), and bears out Klitgaard's and Saunders' testimony thereto.

With the record so clear on the point, that counsel should draw the inference he does and refer to our *forcing a balance* (by which we understand him to mean the substitution of fabricated proof), passes our understanding.

The Contract an Entirety.

(pp. 22-26.)

Under this head, in referring to the provision of the specifications that the work was "all to be in strict

accordance with the specifications", this gratuitous statement is made:

> "The purpose of this provision is plain when we consult the specifications *which contain 15 items, most of which are interlocking work upon an engine.*"

In the first place, on its face, the provision referred to clearly shows it to have been inserted for the benefit of the appellant and not the appellee, and it applies severally and jointly, and not jointly alone, to the 15 items of the list. Secondly, not a single item of the specifications interlocks with another. In other words, any one of the 15 items might be omitted entirely without affecting the performance of the work on the remainder. This statement can be borne out by a simple reading of the items themselves. In fact, it would seem from an inspection of the list that this had been one of the objects sought to be accomplished by the drawer of it,—to make a segregation of the work into distinct and independent items, else why should they be numbered? When counsel, therefore, says that changes in the specifications would have destroyed the "*entirety*" he should have said destroyed the *contract*. For the court's benefit we epitomize the 15 items:

Item I. Work on air pump and condenser.

Item II. Work on L. P. engine.

Item III. Work on jacking worm wheel connected with main shaft.

Item IV. Work on H. P. and L. P. *guides* for water circulation.

Item V. Work on H. P. and L. P. *eccentric straps* (remetalling).

Item VI. Work on H. P. *cylinder.*

Item VII. Work on iron column to support H. P. cylinder.

Item VIII. Work on reaming bolt holes in No. 2 shaft coupling.

Item IX. Work on crankshaft and other shaft work and wheel.

Item X. Work on blow off cocks on skin of ship and sea cocks and valves.

Item XI. Work on valve chamber of circulating pump.

Item XII. Work on engine room tank tops.

Item XIII. Work on bulkhead of fore and aft peak tank tops.

Item XIV. Work on windlass and forecastle head.

Item XV. Ship docked, cleaned and painted.

(I, 52-56.)

As to the cases cited by counsel under this head, they hardly bear out his contention. Thus, in *Lincoln v. Schwartz,* 70 Ill. 137, the defendants, for whom the work was being done, refused to go on with the contract and, of course, they could not hold the plaintiff to the contract price. The court also remarked that it was not shown that, figuring from the contract, the price would be any more favorable to the defendants. In *Rhodes v. Clute,* 53 Pac. 990, the contract was entirely

departed from and a brick house built in place of a frame one. The case contains nothing in point as to the entirety of the contract. In *Pitcairn v. Philip Hiss Co.,* 113 Fed. 496, it is simply held that the particular contract had been *defectively* performed and that, therefore, there could be no recovery on the contract. If there had been a *substantial* performance, recovery would have been allowed, despite minor changes. In *Rounds v. Aiken Mfg. Co.,* 36 S. E. 722, the court held that a charge for *extra work* should be recovered on a quantum meruit. The case goes no further than this.

Counsel wholly ignores the cases cited by us which show that, in a proper case, even a lump sum contract may be followed although very important changes are made. To this effect are the cases of *Ry. Co. v. Snelling,* 59 Texas 116; *City Street Improvement Co. v. Kroh,* 158 Cal. 308, and *Goodwin v. McCormick,* 6 N. Y. Supp. 662. In the last case cited there were many variations from the contract made by consent, but plaintiff was able to detail the alterations and estimate the fair value of each deviation, and it was held that, as the contract could be traced and the extra work figured out, the latter only should be allowed for on a quantum meruit. The case is very short and very much in point.

If, however, there was a contract in the case at bar; if certain *substituted* methods of performing the work were agreed on (with or without extra allowances for the same) and if, at the time the contract was let, it was understood that a deduction should be made if the crankshaft came out, then all talk about the entirety or

non-entirety of the contract is immaterial and misleading. Under such circumstances the contract price would clearly apply to said work with a proper deduction for the crankshaft, which deduction, like the extra work done, should of course be figured on a quantum meruit.

But let us go even further and suppose that there was no agreement about the crankshaft. Is counsel to be allowed to claim that because a certain item was *omitted* his client can charge a *greater price* on that account? Can he say: "True it is that my client contracted to do work on 15 items for $11,749, but one of those items was left out and, therefore, the contract is destroyed and I can charge more than $11,749 for the other 14 items."? Such an argument refutes itself.

Value of Modifications Not Agreed On.

(pp. 26-48.)

Under this heading there are but few points which have not already been sufficiently covered or that require reply. Counsel's principal contention rests on the wording of our pleading which requires no further treatment. A new point, however, is raised to the effect that our answer in another particular is silent again in regard to what we conceive to be a matter of fact to be proven by us in our establishment of the contract. It is asserted that the answer is silent as to the extra challenge metal which Klitgaard says was agreed to be allowed in the compensation agreement under item 4 of the specifications. What of it? The

credit for this metal was given to appellee by our experts in their estimate of the value of the entire work. The court will remember that after the original estimate of April 29th, as a result of seeing the vessel in the drydock and conversations with Mr. Klitgaard, who had not been seen up to that time, Gardner and Heynemann reviewed and revised their estimate and, after making appropriate credits and debits to conform to their newly acquired information, they found the difference was so small they decided to make no change in the original figure (VI, 2268-2269). Mr. Gardner testified:

> Yes, we had some conversations with Mr. Klitgaard who informed us that we had not been just in some cases to the United Engineering Works in the manner (matter) of not allowing them certain material, which he stated he had agreed should be paid for as an extra.
>
> (VI, 2269.)

Item No. 131 of Kinsman's Exhibit No. 2, used by the experts in their examinations, was the item covering the compensation work under specification item No. 4 referred to at p. 28 of the reply brief. On being examined on this item No. 131 Mr. Gardner said:

> We saw this work and considered it was covered by item No. 4 of the original specifications *as compensation work,* though at the present time I am inclined to think that we allowed the challenge metal as an extra.
>
> (VI, 2265. See also pp. 2266, 2271-2272.)

Likewise, Mr. Heynemann, in referring to the same item, said:

> No. 131, we considered that this item was partly covered—I will state that we saw these shoes and considered that the item was partly covered by item No. 4 of the general specifications *with the exception of the challenge metal for which we allowed for an extra.*
>
> (VI, 2046.)

Again item No. 132 of Kinsman's Exhibit No. 2 was the item of appellee's billhead covering the compensation work under specification item No. 5, in which the only other credit was coming to the appellee. As to this item, too, the testimony is equally as clear:

> We saw this work and considered that it was covered by item 5 of the original specifications, *as compensation work. This is another item that has been the subject of consideration since the estimate of April 29th,* and as this is compensation work, or rather although this is compensation work, and we could see no reason for allowing the bronze or challenge metal, we did allow for bronze and challenge metal owing to the fact that Mr. Klitgaard, I think it was, *stated that he had agreed to pay for the challenge metal in connection with this work also the bronze.*
>
> (Gardner, VI, 2267.)

This evidence is not only strongly corroborative of Klitgaard's testimony and Saunders' relative to the *agreement* as to compensation and substitution work, but, if more were needed, it entirely demolishes counsel's reckless assertion of *absolute certainty "that respondent at the time its answer was drawn was preferring no contention that the changes and modifications of the specifications were to compensate one for the other."* (brief, p. 32.)

The only other matter requiring answer under this head of appellee's brief is the reply made to our argument arising out of the fact that all this compensation work was given the original number 5295, whereas, if it had been considered an extra, it would have received a separate number (opening brief, pp. 169-173). Curtis's excuse for this, as pointed out in our brief as well as in appellee's, was that because of the number of changes being made he ordered a consolidation of all the work under one number—5295. Since writing our opening brief we have become convinced that our interpretation of Curtis's testimony on this point, as found on page 171, is incorrect. This witness's consolidation order, we now contend, was not one which affected the time and material card record *of the men,* but one which affected the final sheets of the *foremen* showing the completed work, from which sheets he, Curtis, compiled his bill-heading. He says:

> I instructed the foreman of every department to use the numbers on the job collectively, and to note on their sheets the work as they actually performed it.
>
> (IV, 1463.)

If this consolidation order was ever intended for more than this it was never carried out, for up to the very close of the job the time and material *cards* continued to show *different* quantum meruit job numbers which were never discarded until the billhead (Schedule 1) was prepared by Curtis.

> Q. Now, Mr. Curtis, you have said that the labor and material found on Schedule 1 was furnished under certain numbers that you gave?

A. Yes, sir.

Q. That is correct is it?

A. Yes, sir.

Q. And that in making out Schedule 1 you discarded these numbers and consolidated all the work and material under that schedule without giving it a number?

A. I did not discard the numbers. I used those numbers collectively. I used that as a serial number for that and consolidated all the work done under these numbers in Schedule 1.

* * * * * * *

Q. These several numbers which were consolidated in Schedule 1 *were placed on the lists of work to be performed by you, were they?*

A. They were, yes.

Q. And during the progress of the work the workmen placed these respective numbers on their time cards, did they not?

A. They did.

(V, 1587-1589.)

(And we may add, parenthetically, that from these time cards the charging part of its bill was compiled.)

From this evidence it will be seen that our charge that Curtis's order was "but one way of ordering the work to be mixed up" applies properly only to the lists of work and billheadings compiled therefrom.

A. These headings are the result of the consolidation of the reports of the work furnished by the different foremen of the different departments of our yard.

Q. What office do they perform as a record in the office of the United Engineering Works?

A. They are the original record. *It is the only record that we keep.*

(IV, 1428-1429.)

If we are right in this construction of Curtis's "consolidating" testimony, as applied to *compensation* and *substituted* work, then our question (misquoted by counsel, p. 44 of reply brief); "Why was it not then given a separate number?", still requires reply.

Counsel's *loss of time argument* (pp. 45, 46), does not apply to the compensation and substituted work, for such work was agreed to *before* it was commenced, while Siverson's illustration of loss of time on *spring bearings* has already received our notice.

Bid Was Not Accepted But Cost to Be Determined by Time and Material.

(pp. 48-69.)

Crankshaft controversy.

At the outset, under this head, we could answer counsel's argument from a legal standpoint in a way that would put an end to his entire contention on the subject for, *from a legal standpoint,* we could contend for a contract evidenced *solely* by the written specifications and bid of August 2nd (see answer, I, 47), that the parties at the time contemplated a possible modification, and *orally* agreed that in such eventuality an appropriate credit should be made, in no way affecting the legal status as embodied in the written instruments; that, though the contemplated modification became a reality, *through the consent of both parties,* it did not destroy the written contract as the

measure of the value of the unmodified remainder, provided it were possible to segregate, trace and value the modified work; that in the absence of *consent* either party could have enforced the written contract without modification; and that further, as a matter of law, the oral agreement as to the crankshaft was no more a part of the written contract than was the oral understanding that a timekeeper was to be employed. But, as counsel's brief is directly intended as a reply to ours, we will confine ourselves strictly to the matter as understood by the parties to the agreement, namely: to the contention that the written contract was *accepted,* with the proviso that an appropriate deduction should be made in case it was decided that the crankshaft need not come out.

The reason Klitgaard drew specifications requiring the shaft's removal, contrary to his judgment, is clearly set forth by Klitgaard (opening brief, p. 173), and counsel's statement that the question had not been discussed with the other bidders, the Union Iron Works or the Risdon Iron Works, is entirely gratuitous.

Appellee's discussion next passes to the matter of the change in the letter of April 29th, 1910 (pp. 52-59). As to this matter the evidence is uncontradicted that Mr. Diericx made a report to counsel at the time of his employment, and that in it appeared the proviso as it originally appeared in the April 29th letter, along with a further statement showing that the proviso referred to the possible non-removal of the crankshaft. The witness said that he had asked Mr. Gard-

ner if he had a copy of this report, who replied that he thought he had (McClanahan, VI, 2199). The proviso was changed in the letter of April 29th to read:

> There was a benefit coming to the Matson Navigation Co. if it was decided not to take the crankshaft out of the ship.

We submit that this change agrees not only with Matson's testimony and Saunders', but absolutely with Gray's.

> Q. What was the understanding about this undetermined matter of the taking of the crankshaft out?
>
> A. Well, there was a timekeeper sent to the yards to look out for the job as a whole, and he was supposed to determine what the loss or what the saving would be.
>
> Q. And if there was a saving the Matson people would get the credit for it?
>
> A. Most assuredly they would have got the credit for it, that is what they put the timekeeper on the job for.
>
> (VII, 2405-2406.)

Where Diericx got the peculiar phraseology of his report the record does not reveal. He had nothing to do with the letting of the contract,—in fact it was let months before he had any connection with appellant (I, 106-107).

Counsel would have it inferred that the crankshaft controversy (as well as the contention of compensation and substitution work), was evolved for the purpose of this suit. Our opening brief refers to evidence of

Gray corroborating that of Matson and Saunders, and shows clearly that the question of the shaft's removal or non-removal was of long standing.

Furthermore, what does counsel mean when he characterizes the original proviso as a memorandum of Captain Matson's and Saunders' recollection of the agreement *"made when it was yet clear in their minds and before the new contention was born"* (p. 59). This was a memorandum of neither of these men, and to make the positive assertion that, "of course, *Mr. Diericx could only have received the information contained in that proviso from Captain Matson or Captain Saunders or both"*, is not warranted by the record, for Diericx had gone over the dispute with appellee (I, 103), while Captain Matson was in Honolulu (I, 105) and, if the original proviso *"is precisely the agreement"* to which Mr. Gray testified, the inference as to where Diericx got it is as properly drawn that he got it from someone connected with the appellee as from either Matson or Saunders.

The change in the letter of April 29th was made to conform to the proof which counsel then and always had. It was made for no ulterior purpose,—had there been such we presume that the proper course would have been to have instructed Gardner to have destroyed the original but, as the court will see, there was no attempt of any kind to suppress or hide what had been done. We believed our action was right and attempted, as the record shows, to convince counsel that there was no ulterior motive and thus save the

record. But counsel would not accept our explanation. The letter was obviously not changed for the purpose of putting the change in evidence. It was used by Mr. Heynemann in his direct examination simply to refresh his memory and, there being an error in it, there was certainly no objection to correcting that error, the document simply being for the private use of the witness. Counsel, however, saw fit to introduce it on the cross examination simply for the purpose of casting suspicion on the appellant and on his request the original letter was promptly produced. If appellant's counsel had suggested and the experts had made this change for the purpose of introducing the document in evidence, it would be a very different matter, but the changing of a document used as a mere assistant to the memory is hardly subject to the censure heaped upon such action. We could have further enlarged the record by putting Mr. Diericx on the stand, introducing his report and securing his explanation of it, but on second thought it seemed really an immaterial matter of no consequence as determinative of the issue involved, and so no further notice was taken of it except as is found in the brief references in McClanahan's testimony. At this time we find embarrassment in even undertaking a defense of the charge of ulterior motive, for we believe the circumstances are so clearly free of even suspicion of wrong that to defend lends dignity to the charge.

Counsel defends his failure to ask Gray with reference to the acceptance of the bid of August 2nd by call-

ing such evidence a "legal conclusion". He says he asked the witness: "for the conversations that passed between them and directed his attention to *the only material fact in dispute, namely, conversations* with respect to a reduction in the bid if the crankshaft did not come out of the vessel". The truth is that counsel deliberately confined the witness to that feature of the conversations. In answer to the question: "Now, at the time these bids were put in, did you have any conversation with Captain Matson?" Mr. Gray replied:

> A. I certainly had conversations with him. Do you want me to detail it?
> Q. I will come to it. Did you ever, etc.
> (VII, 2346.)

Counsel, however, never did *"come to it"*. To say that the question as to whether Gray said to Matson that if the crankshaft did not come out he would make a deduction of $2000 in the bid was *"the only material fact in dispute"* is really amusing. We ask counsel, what about the materiality of the unqualified testimony of Matson and Saunders that the bid was accepted? However, if to Gray's testimony there has been given *"an added badge"* of verity, because of its being given under cross examination, then we appreciate to the full his admission to us respecting this *"only material fact in the case"*: "Most assuredly they would have got the credit for it; that is what they put a timekeeper on the job for."

Counsel's apology for instructing the witness Gray not to answer the question: "You take the position

then that there was no contract with Captain Matson?'' (VII, 2425), on the ground that it was a question of law and between the colloquial understanding and the legal understanding ''none but lawyers distinguish'', is begging the question. Mr. Gray knew the kind of contract which the question referred to, for the whole matter was introduced upon the gratuitous suggestion of the witness himself: ''It was generally understood there was going to be a timekeeper on the job after he had come to the conclusion that they were *not going to let it out on a contract*—that was understood'' (VII, 2407). This was the kind of contract (the ''colloquial'' kind), which the question was directed to, and both counsel and the witness must have known it, and to say that it was ''unfair to attempt to force a layman'' to answer the question, because he was ''unqualified'', is amusing to say the least.

It is next said in exoneration of the testimony of the witness, which we characterized as confusing and contradictory, that he ''has plainly given the details of the conversations *which prove the agreement to have been for work on a time and material basis* * * *''. If it is contended that Gray, appellee's *only* witness to the conversation respecting the bid of August 2nd, establishes the contention that the work was agreed to be done on a *time and material* basis, then, we repeat that on that subject and *in support of that contention,* the witness's testimony *is* confusing and contradictory. Here is Gray's testimony:

Matson made the statement that he was dissatisfied with the price and thought it should be done for less money. * * * That is what he told me, and he said he was going to send a timekeeper to the yards to get the benefit of whatever saving he could get on the job.

Q. Saving on what job?

A. Below this price; he claimed that the price was too high.

Q. Did you say that you would do it for that money?

A. Did I say I would do it for that money? If they stuck to the specifications, certainly.

Q. And he said that he would not pay you that price?

A. His idea was that it was too much.

Q. I want to know what he said.

A. He did not say he would not pay it.

Q. What did he say?

A. He said he was dissatisfied with it, he felt it was too high and he was going to send a timekeeper to the yard to keep track of the time on the job.

Q. *And it was to be a time and material job?*

A. Time and material *under those conditions.* I told him, I said, "If those specifications are adhered to I will see that it don't cost you more than $11,749."

Q. In other words that was an outside price?

A. A limiting price.

Q. It should not cost more than that?

A. Not any more than that.

Q. So then, you and he did have a contract by which this work was to be done in strict accordance with the specifications not to exceed $11,749?

(Objection by counsel.)

* * * * * * *

A. Well, I told you what I said. I don't know as I have anything more to say regarding it.

Q. Read the question to the witness again.
(Last question again repeated by reporter.)
A. Provided they stuck to the specifications.
Q. Your answer is yes?
A. Yes.
Q. And the work was to be done in 25 days, was it not?
Mr. FRANK. Well, the contract speaks for itself.
A. 25 days, yes.
Mr. MCCLANAHAN. Q. Who was present when that agreement was finally reached?
A. Captain Matson, myself——
Q. (Intg.) Captain Saunders was there was he not?
A. You could not prove it by me. I don't know.
(VII, 2408-2410.)

We reiterate that if the foregoing are the "details of the conversations which prove the agreement to have been for work on a time and material basis," our criticism of its being confusing and contradictory is all too mildly stated.

Furthermore, if, as claimed, this evidence conforms "in every respect to the proviso stricken from the report above referred to by the experts", what of it? That proviso calls for a "colloquial" contract, such as that contended for, and is not in harmony with appellee's contention that there was no such contract, but that the job was time and material. The proviso reads:

> "The contract price as per the offer of the United Engineering Works under date August 2nd, 1909, was $11,749, and 25 days, with the proviso that this was to be the upset price, and if the work could be done less than the above amount, figuring the best obtainable rates both for material and

labor, then the steamship company should receive the benefit of same.''

If there be anything either in Gray's testimony or in the above report, supporting the necessary and vital contention of appellee in this case *that there was no contract* to do this work for $11,749, but that it was to be done and charged for on a time and material basis, then we admit our incompetency to read plain English.

Counsel summarily disposes of the remaining portion of our brief on this subject of contract (pp. 149-158) by saying that it consists of comments upon the testimony of Christy, Klitgaard, Siverson and Curtis, who had nothing to do with it. But our contentions on these pages cannot be so lightly treated, and that the points there made have not been answered is proof that they cannot be.

Discrepancies in the Several Specification Exhibits.

(p. 66.)

The cross-examination of the witness, Christy, at its commencement is directed to the *original* specifications under which the ''Hilonian'' repair work was commenced (IV, 1230). The examination on this subject culminates at p. 1248 of the record in a request that there be produced the specifications on which the work was figured referred to in the bid of August 2nd. After a recess this occurred:

Mr. McClanahan. Mr. Frank, have you secured the specifications?

A. I have a set of specifications here that comes with our records. Whether or not (it) is the par-

ticular specifications referred to in those letters I am unable to say.

Mr. McClanahan. Is there no one that can enlighten us on that?

A. Not that I know of.

(IV, 1257.)

The list is then introduced as Respondent's Exhibit Christy "C".

The following then appears:

Q. And you cannot tell whether Exhibit "C", which has just been introduced in evidence is the original of the specifications or a list of work to be performed on the "Hilonian"?

A. I cannot.

Q. You cannot tell me now whether you received a copy of Exhibit "C"?

A. I cannot.

Q. You can tell me, however, that you did receive a copy of the work to be performed on the "Hilonian"?

A. I received a list of work to be performed on the "Hilonian".

Mr. McClanahan. I will have to ask you, Mr. Frank, to produce from the records of the office the original of which a copy was made and given to the witness, or else admit that this is such a copy.

Mr. Frank. That is the most unique demand I have ever heard of.

Mr. McClanahan. Are you going to make an objection?

Mr. Frank. Yes, I am. You want to demand of me that I make an admission to suit your case; I have no admission to make as to anything except what I know. I have produced what you have asked for, to the best of my knowledge. I have no admission to make of anything that I do not know anything about.

Mr. McClanahan. Then I ask you to produce the original of these specifications or list of work which has been testified to by the witness.

Mr. Frank. The witness has already told you they are destroyed. How can I do so?

Mr. McClanahan. The witness has not testified to that effect. He testified to the effect that the copy he received from the office over here was destroyed. I want the original from which that copy was made.

Mr. Frank. I have produced all the papers that I know anything about relating to that matter. I do not see the object of this. If you have the specifications that you claim are a part of that contract or the alleged contract it is in your power to produce them.

(IV, 1267-1268.)

With this evidence in view, how can counsel have the temerity to say:

> *"The only specifications that the executive officers of the United had was respondent's Exhibit Christy 'C'."*

Then, after averring that Christy "C" is identical with the copy annexed to the answer as Exhibit 1:

> "This fact is conclusive regarding the nature of the specifications upon which the bid was made and under which the work was undertaken."

Again counsel says:

> "The specifications, however, which are presented to the experts and *under which their work is done* is Respondent's Exhibit Saunders No. 1 (p. 2639), which has an important addition in the last paragraph and an unimportant omission in the words 'no less' at the end of the seventh paragraph."

Where in all the record is to be found one word to substantiate the portion of this sentence which we have

italicized? Counsel must know that our experts *did no work under the specifications.* He must know that their work was done under an itemized heading of appellee's own bill (Schedule 1), which is reproduced in Kinsman's Exhibit No. 2, found at p. 2643 of the record. This itemization is a complete statement of all that was done and charged for.

Furthermore, Captain Saunders testified that the Union Iron Works, the Risdon and the "United," before any of their bids were submitted, all had in their possession both sets of specifications.

> Q. Can you state whether or no they had both sets of specifications (Siverson "A", VII, 2658; Saunders 1, VII, 2639) in their possession before the bids were made which you have identified?
> A. Yes, sir, they all had both sets.
> (V, 1762-1763.)

And Klitgaard identified Saunders' Exhibit No. 1 as containing the list of specification work as originally drawn by him (VI, 1927).

Adding to the foregoing Mr. Gardner's statement that the reassembling provision of Saunders' Exhibit No. 1 would be implied in any event, we submit that counsel's charge that that was an insertion by appellant "ex industria in the set of specifications *now contended for,*" is entirely uncalled for, and on a par with many other extravagant statements which have been pointed out and which we shall continue to point out throughout the entire reply brief.

Was the Quantum Meruit Satisfactorily Proven?

(p. 69.)

We are not disputing counsel's opening statement under this head to the effect that appellee's proof is based upon its card system but we do say that the further contention that this system *"was the basis upon which the United ascertained the cost of production (when) building upon their own account,"* is not supported by either counsel's reference to Curtis's testimony (IV, 1425-1431), or any other testimony in the case. In fact this is the first time we have had any intimation of the appellee *manufacturing on its own account.* The nearest to any such suggestion comes from Adamson with reference to the building of an engine under job number 4858 (I, 262), but this engine was clearly intended for the Standard Oil Co. boat upon which the "United" was working (Christy, IV, 1287). This failure of the record to substantiate counsel's suggestion that the appellee was a manufacturer on its own account adds point to our former contention that the *cost* of work can only be a fair measure of its value where (as in the case of a manufacturer on its own account), it is of a competitive character (opening brief, p. 131).

To counsel's further statement that the "United's" entire accounting system depended upon the card system we agree, with the proviso, *so far as the record discloses.* And furthermore, speaking solely from the record, we reaffirm that under this card system the matter of the segregation and apportionment of the day's work to each individual job number was a detail "affecting the pocketbook of the customer and not the libelant." That

appellee was utterly indifferent to this matter of ascertainment of time expended on particular job numbers, beyond leaving it to the individual workmen, is made perfectly clear by Mr. Christy himself, for he points out the only method by which it can be accomplished, and it was not the method employed, even though his testimony seems to hint that it was. On his cross-examination we find this:

> It is not difficult, is it, to follow time and labor and material put on a *particular* piece of work?
>
> A. If you have timekeepers on the work, why it is possible to keep a fairly accurate record of all the work done.
>
> Q. Did you have any timekeepers on the Hilonian work?
>
> A. We had *the timekeeper* always in our yard.
>
> Q. Did you have one on the Hilonian work?
>
> A. Not particularly the Hilonian; he keeps all of our work, all the work that is in the shop.
>
> Q. What is his name?
>
> A. The man in charge of the time department now is Walter White, the man that was in charge then was——
>
> Q. Sjoberg?
>
> A. Sjoberg.
>
> (Christy, IV, 1282-1283.)

Poor Sjoberg! Known to all the men as the timekeeper; known to the manager of the works as the timekeeper; he is known to Curtis, *the man in charge of this particular litigation,* only as the "clerk" with so little knowledge of matters affecting the controversy as to make it unnecessary to call him to testify.

> * * * I would set the job numbers, that is, instruct the clerk to set the job numbers on these lists after reading them over.

Q. Whom do you mean by the clerk?
A. I mean Mr. Sjoberg.
Q. He is the man that some of these men call the timekeeper?
A. Yes sir.
(Curtis's direct examination, IV, 1427-1428.)

(We might parenthetically add that Sjoberg was the man that *all* the workmen called the timekeeper.)

Later on Curtis forgets and calls him by his true title:

I would go over the shop cards with the timekeeper in the office.
(id. 1430.)

And again:

A. Yes sir, these cards, and the timekeeper, and *this manner* I have explained is the usual and customary course of keeping accounts of the United Engineering Works.
(id. 1431.)

"This manner," referred to by the witness, consisted in sending to the foremen of the various departments a copy of the work to be done (id. 1428) and keeping a copy himself. When the work was completed the reports of the work done were collected and, after they were checked up with the foremen, they were consolidated into a heading for the customer's bill. After this these reports or lists of work were destroyed (id. 1428). As to the time cards and material cards, they were turned in every day after being daily checked by the different foremen, and were then gone over by

Curtis and, if ship time cards, were then turned over to the ship timekeeper. After Curtis and the ship timekeeper arrived at a settlement of the day's time these cards were destroyed (id. 1429). As to the shop time cards, after they reached the office from the foremen of the different departments, they were gone over by Curtis and the timekeeper *in the office.* They were then segregated and "consolidated" into the customer's bill (id. 1430). Subsequently, if no dispute arose with the customer after he got his bill, these cards also were destroyed (id. 1431).

The foregoing is the "usual and customary course of keeping the accounts of the United Engineering Works," and from it two very important facts stand out, namely:

1st. There is no ascertainment by appellee of the labor performed on the individual job numbers other than that shown by the personal record of the men; and

2nd. The cards are not memoranda such as make them an exception to the hearsay rule on the ground of accounts kept in the regular course of business. But this matter will receive our attention later.

There is no evidence in the case to show that the *handling* by appellee of the *completed* time cards of *ship workmen* was materially different from the handling of the cards of the *shop workmen.* Nor does there appear to be any reason why there should have been. For instance: Suppose both ship and shop work is done on a time and material basis, and the vessel has no timekeeper, and both ship and shop time cards show instances of workmen performing work *under separate*

job numbers,—why should not appellee's time checking system, intended to keep a check on the workmen's personal allotment of time to separate jobs, be the same for ship as for shop work? It undoubtedly was, and we have proof in this case of the exact extent of that system that sustains our contention that it did not include an independent checking of a man's time as applied to his personal allotment of it to separate jobs. In speaking of the system of checking *completed ship timecards,* on cross-examination Curtis says:

> A. First, they would be checked over as regards the clock cards as to whether a man worked on that date. Then they would be checked over as regards the job numbers.
>
> Q. Then what? Is that all?
>
> A. Then they would be turned over to Mr. Putzar.
>
> Q. I am talking about the checking, is that all the checking that was done?
>
> A. That would be the checking.
>
> (IV, 1493-1494.)

In case the owner has a timekeeper on the ship, Curtis says the timecards are again checked up by him with such timekeeper's time sheets (id. 1492).

Despite counsel's personalities which include charges of "inherent exaggeration," "fraud and collusion," "spleen," "forcing of balances," "malignity," "intemperate mind," etc., we submit that our criticism of appellee's system, as disclosed by the record, was temperate and does not warrant the statement that after ten years of business relations we suddenly find "that the entire works, including owner, foremen and workmen, is one nest of conspirators against its customers"

(pp. 71, 72). Furthermore, this and counsel's repeated references to the past amicable relations of the parties are unfortunate, because of the contradiction in the gratuitous statement of his own witness:

> Well, I had one big row with the Matson Navigation Co. over a ship and this looked very much like another one coming.
>
> (Gray, VII, 2381.)

In an attempt further to predjudice appellant in the mind of the court counsel reiterates the contention made under the heading *"Facts of the case,"* that appellant has been unfair in not agreeing to check this bill up, both before and after suit; that in the matter of pleading it resorted to technicalities to avoid fairly meeting the issue; and finally, in the matter of time and material cards, it made covert suggestions as to their correctness after they had been placed in the record, and repeatedly declined to point out these errors that they might be explained. As we have already in part answered appellee on this score, we will be brief in our further reply, as the contentions are all foreign to any issue before the court.

As showing appellant's true spirit in this controversy, it will be remembered that in order to avoid litigation it proposed to pay appellee's bill at a compromise figure.

> Q. Very well. But you yourself, acting as assistant general manager of this company, have proposed figures to be paid for this bill, have you not?
>
> A. In trying to arrive at an amicable settlement and avoid a law suit I did in Capt. Matson's absence at Honolulu.
>
> (Diericx, I, 105.)

As to the charge that appellant has been unfair in the matter of settling the pleadings, it will be seen that in the original libel, as filed, there was a discrepancy between the amount sued for and the sum total of the various schedules, resulting from a duplication or repetition in Schedule 3 of certain items in Schedule 2 as shown at pp. 35 and 36 of the record. This discrepancy called for exceptions to the libel which were filed and afterwards, by consent, overruled pro forma (1, 45). Its answer was then filed denying, under the first cause of action, that Schedules 1, 2 and 3 truly set forth the particulars and value of material and labor done on the "Hilonian" and, as a separate answer, it sets up the contract of August 2nd. As to the second cause of action, appellant admitted the allegations pertaining to Schedules 4 to 10, except as to two minor items in Schedule 4 and two in Schedule 9, and then affirmatively alleges that there is due and owing under both causes of action $22,922.56, which it tendered to the appellee on May 2nd, 1910. We attached to our answer two interrogatories, one of which called upon respondent to admit that our Exhibit 1 was a true copy of the original specifications or point out wherein it differed. The other called upon respondent to admit that Exhibit 2 was a true copy of its bid of August 2nd, 1909 (I, 57). Neither of these interrogatories was ever answered by appellee.

To our answer appellee filed exceptions which were partially sustained, but not to the extent of requiring appellant to make its answer any more definite as to the values alleged in the libel, and permitting it to call

for proof respecting such of the items as it had no knowledge of. Appellant then filed its amended answer denying knowledge of the truth of the *particular materials* and *labor* and the *value thereof* (I, 22-32). As to *the particulars of the work performed,* appellant's answer admitted in detail the work done on the "Hilonian" (I, 64-71), and this admission covers the allegation of such work as shown by Schedule 1 of the libel, with a few minor exceptions, as for instance:

Schedule 1 starts out with, "Renewed No. 4 tank top on port side." Our answer admits: "Renewed *part of* No. 4 tank top on port side." Another item of the schedule recites: "Tested 3 stm. gauges, supplied 2 stm. and 2 amonia gauges." Our answer admits: "Tested 3 stm. gauges, supplied 2 stm. and *1* amonia gauge" (I, 69).

Minor differences such as these were covered by the concluding paragraph of the answer, wherein we called for proof because of our lack of knowledge (I, 171). And right here be it said that such proof by appellee was never made.

Finally, appellee again excepted to our answer as amended, which exceptions were overruled (I, 84). This record, we submit, does not show that appellant "resorted to technicalities to avoid fairly meeting the issue" as claimed by counsel. Again, as to our refusal to give to counsel the fruits of our labor in the matter of charges appearing in appellee's quantum meruit proof, which were the subject of contracts, we have no apologies to offer. We declined, and properly so, to give appellee *an opportunity for explanation.* At the

time, in the heat of trial, this matter of irregularities in appellee's proof was of course not fully developed, and its subsequent development to the extent we have pointed out was a task of considerable magnitude. But the point of the whole matter is that this was appellee's case, and it had no right to demand that we assist in making it proof against attack. Our reply to this demand was perfectly proper.

> All of the proof of your case has been presented by you. You should know what it is. You should know that there is not, or that there is, such evidence as I have suggested. If you claim that there is not, it is a matter of issue between us to be threshed out on the argument of the case.
> (V, 1649.)

Small wonder that counsel did not carry out his threat to take before the court his demand that appellant's counsel be added to appellee's staff of attorneys, and to suggest that the reason for not doing so was because it was *"lost sight of because of difficulty in securing a time convenient to the court to take up such controversy"* is nearer the truth than counsel thought, for no court would find *"time convenient"* to hear such a puerile demand.

Appellee's case was closed with the agreed reservation that the matter might be taken before the court and Mr. Curtis might be further called for re-direct examination thereafter (V, 1654). In the further conduct of the case both counsel appeared before the court on at least one occasion that we remember (VI, 2126), but nothing was then said of this reserved question, and the real reason was obvious, for we have learned

that counsel is not given to *real* forgetfulness *in matters of importance.*

Counsel makes caustic criticism of our statement that Appendix 1 of our brief does not pretend to be complete, and adds that "We think it fair to infer that he has called attention to all that he could *'invent'* " (p. 81). If anything shown in Appendix 1 is an invention, the time cards referred to therein were in counsel's possession and it would have been a very simple matter to prove such invention, and counsel's declaration of his intention to "presently" show how *"palpably unfounded those objections are"* never took any more definite shape than a reference to certain parts of the record "as a complete answer" (Appendix 2, reply brief, p. 79). What there is in this offered evidence that shows an invention, or has the remotest bearing on our charge that Schedule 1 of the libel has included in it labor charges on piston rods, thrust collars and spring bearings (contract work under Schedule 4); labor charges on brake rig on reversing shaft (contract work under Schedule 7); labor charges on main bearings (contract work under Schedule 8); labor charges on smoke-stack (contract work under Schedule 9); labor charges on tube heads (contract work under Schedule 10), we fail to see. And if this be counsel's showing of invention, and of how "palpably unfounded these charges are," then nothing can be said of the desperate recklessness of both the charge and the offer.

If a workman works on "tube heads" it is to be presumed that he has intelligence sufficient to put tube heads on his time card and, if Curtis has told him that the job number for tube heads is 5295, and he puts that on his card, and Curtis charges all 5295 work as a quan-

tum meruit, we cannot see how counsel, except he be desperate with his back to the wall, can characterize as an *invention* our assertion that such a charge is a duplication of a contract. And so with all the items of Appendix 1.

As to spring bearings, main bearings and smokestack work appearing on Appendix 1, as quantum meruit charges, surely there is no invention as to these, for counsel admits them to have been charged in Schedule 1, but tries to justify such charge on the ground that they are extras.

It would entail much additional labor, and we believe it to be unnecessary in view of the clear failure of counsel to meet the showing made by Appendix 1, for us to substantiate by a further examination of the record our statement that the duplication list does not pretend to be complete. We are convinced now, however, that in crediting Curtis's statement that he has not charged in Schedule 1 any contract schedule numbers appearing on cards where there are proper quantum meruit numbers (IV, 1436), we have perhaps gone too far. If, for instance, Schedule 1 is charged by Curtis with the 23 hours of work under contract 5401 shown by the card of John Williams, dated Sept. 19th, part of Adamson's Exhibit 127 (the only entry on the card and a card by the way which might be properly added to the Appendix as one overlooked by us in compiling that list), why should the court, on Curtis's unsupported statement, believe that when 5401 appears on other cards *with* a quantum meruit number he *omitted* to charge it. It seems to us that if he has the effrontery to say that the former is a proper charge the reason for believing that

the latter has also been charged is at least a reasonable one.

Counsel does not attempt to explain Appendix 1 on the ground of mistake, or, as we tried on the cross-examination of Curtis to get him to explain it, on the ground of an inadvertence, but in fact these charges are defended on the inappropriate testimony referred to showing *"conclusively that the same thing is called by different names by the different men."* Counsel then says that the description of the work on the card is not the controlling element, but "the job numbers are" (Appendix 2, p. 80). If that be so, what has counsel to say of the card of Sept. 19th of John Williams referred to supra? It is also said that our "criticism is not directed to having the bill corrected" because the "113 instances," cited in Appendix 1, amount to an overcharge of only $602, and this is so insignificant when compared to a thirty thousand dollar bill as to make the claim of "hopeless error" ridiculous. This sounds all very fine, even assuming that the figure of $602 is correct, but it must be remembered that the amount in controversy in this case is not thirty thousand dollars but approximately twelve thousand, and that $602 is five per cent of this latter amount. If, moreover, Appendix 1 showed our only criticism of Schedule 1 being an overcharge on appellee's "cost" estimate of quantum meruit value, that would be one thing, but there must be considered a score or more of other criticisms of both shop cards and time sheet charges, of lax methods, of improper overtime, improper allowances of bonus time, of power-house time, and time not legally proven. We venture to say that were all our just criticisms embodied in one lump deduction from appellee's thirty-four

thousand dollar bill it would be found that our offer of twenty-two odd thousand dollars, based on our experts' estimate, greatly exceeded the result.

It is rightly said that our criticism of error is not made for the purpose of correcting appellee's bill, but it is not, however, *altogether true* that the purpose of showing these double charges is that it may have a psychological effect in inducing the court to entirely disregard the time and material cards as untrustworthy. We have another equally cogent reason, and that is that we hope by our criticisms to have pointed out to the court a reason for the difference of twelve thousand dollars between appellee's proof of alleged cost and our proof of reasonable market value.

From this subject of our criticism of time cards, counsel next plunges into a defense of Adamson's special ability to do what we have termed "phenomenal" and "preposterously absurd." It is said that Adamson was a *specialist* and an *expert.* We are inclined to agree with these encomiums if and when applied to Adamson as a witness. However, let us analyze the contention that he *specialized* in timekeeping. In the first place we have not, as stated by counsel, assumed "that Adamson's duties were more numerous than they in fact were." Our statement of his duties finds support in the record as our opening brief shows (pp. 34-35). Indeed, we could have added to our references the very important fact that this man's duties *kept* him at the surface table (II, 467-470). The assertion made by Adamson that his position of assistant foreman was "*created absolutely for the purpose of keeping the proper time of the separate jobs*" is, to use a vulgarism,

all poppycock. Mr. Christy, the general manager, knew something about this matter of who was keeping time on separate jobs, and here is what he says:

> Q. It is not difficult, is it, to follow the time and labor and material put on a particular piece of work?
>
> A. If you have timekeepers on the work, why, it is possible to keep a fairly accurate record of all work done.
>
> Q. Did you have any timekeepers on the "Hilonian" work?
>
> A. We had the timekeeper always in our yard.
>
> Q. Did you have one on the "Hilonian" work?
>
> A. Not particularly the "Hilonian"; he keeps all of our work, all the work that is in the shop.
>
> Q. What is his name?
>
> A. The man in charge of the time department now is Walter White; the man that was in charge then was——
>
> Q. Sjoberg?
>
> A. Sjoberg.
>
> (IV, 1282, 1283.)

Furthermore, the temerity of counsel passes all understanding when he would lead the court to believe that Adamson was still specializing in timekeeping with satisfactory results at the time of the hearing of this case. Referring to our expressions "phenomenal" and "preposterously absurd," as applied to Adamson's claim as a timekeeper, counsel says:

> "Moreover the adjectives lose their force when we consider that that method was continued at the works up to the time that the witness was testifying and gave satisfactory results."

As the claim is made that Adamson's position as *assistant foreman* was created for the very purpose of

keeping time on separate jobs, this must be what counsel refers to in the sentence just quoted. As a matter of fact the *present* assistant foreman fills Adamson's *old* position *without keeping time,* and Doig's position of foreman, which formerly carried with it this duty until *"it was found that it was too much for one man,"* is now occupied by Adamson who does *keep the time.*

> Q. Mr. Adamson, is there an assistant foreman in the machine shop now?
>
> A. Yes, sir, there is a man on the surface plate that fills the position I had at the time this work was going on.
>
> Q. Who checks up the time now?
>
> A. I do.
>
> Q. As a foreman?
>
> A. Yes, sir.
>
> (II, 322.)

> "Moreover, the adjectives lose their force when we consider that that method was continued at the works up to the time that the witness was testifying and gave satisfactory results."

If *"the very existence of the institution"* depends on the practical accuracy with which time is kept on separate jobs, and the position of assistant foreman was created to secure such accuracy, because such duty added to the foreman was found too much for one man, then, as the foreman is now doing that work for which Adamson's former position was *"created absolutely,"* the existence of appellee's business life must indeed be seriously threatened.

Counsel speaks of the corrections on the cards as indicative of Adamson's timekeeping. We believe that

with but two exceptions the record shows that there were no corrections on the cards except as to *job numbers* and *dates,* and that none of the cards show corrections in the time placed there by the man as indicating the labor expended on the individual job numbers, except the cards of Stephen Cronin and Alfred Boyer, the former a boy 16 years old when this work was done (II, 696), and the latter 19 (III, 901). The evidence of both these show that the corrections of time on their cards were made *by Sjoberg, the timekeeper, from the time clock.* In other words, the timekeeper found that the *aggregate* number of hours shown on the cards of these two boys did not correspond with the time clock record and, in performance of his duty as suggested by us in our opening brief, he changed the cards to conform to the clock. Cronin on direct examination testified that certain changes on his cards in the hours were made by the timekeeper (II, 689). On cross-examination we find the following:

Q. You kept your own time, did you?
A. Yes, sir.
Q. You speak of a timekeeper; he was the man in the office, was he not?
A. Yes, sir.
Q. Why do you call him the timekeeper?
A. He always kept track of the time, I guess.
Q. I do not want you to guess; do you know?
A. Yes, sir; he kept track of the time.
Q. How did he keep track of the time?
A. Well, by taking it off the time-cards and putting it down in the book, I guess.
Q. "I guess again." Do you know?
A. Yes, sir, I know.
Q. You knew then that he took the time from the cards and put it down in the books?

A. In books.

Q. In the office?

A. Yes, sir.

Q. Is that all he did with reference to keeping time?

A. I don't remember what else he did.

Q. That is all you know of?

A. Yes, sir.

Q. So that he knew nothing about the time except as he found it on the cards that you turned into the office?

A. Yes, sir.

Q. He was called the timekeeper?

A. Yes, sir.

Q. Did you have any other timekeeper?

A. No, sir.

* * * * * * *

Q. I hand you your exhibit No. 1 and ask you who made the red ink change?

A. The timekeeper.

Q. The 4½ hours?

A. Yes, sir.

Q. How did he know anything about that?

A. It was punched on the clock.

Q. What is punched on the clock?

A. The time I came in. He came over and told me about it and changed it.

(II, 696, 698.)

Referring to another card showing a change, we find this:

Q. What did the timekeeper change it for?

A. Because I made a mistake in the time, and I punched the clock and the clock punched out 3½ hours, and I made a mistake.

(id. 700, 701.)

And again, referring to the clock:

Q. It gives the time you come in and the time you go out exactly?

A. Yes sir.

* * * * * * * *

Q. How did the clock tell you how much of that 7½ hours belonged to 5295?

A. I kept track of the time that I worked on each job number.

Q. I am speaking about the time clock that you punched. How could that tell how much of the 7½ hours belonged to 5295?

A. It don't tell that.

Q. How did the timekeeper know to make that correction?

A. He asked me; he came over and I had it down on a piece of paper and he asked me to look it up. I looked it up and I had 4 hours on that, and the rest of the hours on the other job. I told him I looked at the watch and I guess the mistake was on the watch.

(id. 701, 702.)

Boyer, on his cross-examination, in referring to a change appearing on one of his cards where 12½ hours was reduced to 12 by the timekeeper, was asked:

Q. How would he know whether you had made a mistake or not?

A. By punching the clock, the time clock.

(III, 896.)

We conclude, therefore, that, but for Adamson's own say-so, the record discloses that of the twelve or thirteen hundred time cards introduced there are few showing a correction of time worked on individual job numbers, and that, where such corrections do appear, they were made by the timekeeper and not Adamson, and were

made for the purpose of having the cards conform to the time clock; all of which bears out our contention that under appellee's system the only thought is given to the aggregate number of hours shown on the time card, and its segregation among the various job numbers was left solely to the workmen (opening brief, pp. 14, 15). Not only does counsel make this futile attempt to bolster up Adamson's case by referring to so-called *"corrections"* which he never made, and which when made had no connection whatever with the matter of accuracy of the workmen's record respecting time worked on separate job numbers, but he brings to the rescue Mr. Curtis who, having *"no personal knowledge of the length of time the individual workmen were employed upon a particular job* * * *", —we will stop right there in our quotation for the admission makes absolutely immaterial anything else that could possibly be said about Curtis. And yet the desperate position in which appellee is placed regarding the Adamson proof is here illustrated by this reference to Curtis. Counsel need not have thus apologized for Curtis's lack of *"personal knowledge"* for if, as stated, "he had the whole job under supervision, followed it closely from day to day, and himself went with the cards in case of doubt into the shop, consulted with the men and consulted the piece itself upon which work was performed in order to insure the accuracy of the record," then, we submit, he knew as much or more than Adamson, but, like Adamson, lacking *"personal knowledge"* of the time expended on the "Hilonian" job numbers as recorded on the timecards, his knowledge of all else con-

nected with the job did not and could not fit him as an instrument by which these time card records were attempted to be made independent evidence of the facts recorded on them.

We will pass over with little comment the defense made of Adamson's "personal knowledge" of overtime night work performed during his absence. It rests solely upon the *"good idea"* of the witness and is fully met in our opening brief (pp. 45-48).

This brings us to a consideration of appellee's *defense* of the Mockel incident, the basis of our most serious attack on Adamson. Perhaps we improperly characterized counsel's effort, for, if *"apprehending"* that an attack would be made on the question of the witness's lack of *"personal knowledge"* during times when he *"was not there to check it up"* and *"could not guarantee that he (the workman) had been there,"* the *"precaution"* was taken to *"specially call the particular men who had worked on the 'Hilonian' job during the time that Adamson was so absent,"* then, we submit that in this we find not a *defense* of the witness's testimony but rather an admission of its worthlessness, coupled with an admission of liability to make good the resulting breach made in appellee's proof. If counsel has no defense to make of the desperate recklessness of Adamson in first repudiating Mockel's card of Sept. 12th, and subsequently vouching for not only *its* correctness but also the correctness of every other Sunday card put before him, then Adamson as a witness is admittedly discredited, and we submit his entire

evidence, upon which rests the admissibility of the cards of 58 of the workmen, should be disregarded.

Throughout counsel's brief we find repeatedly statements of fact which astound us, for the reason that it is impossible to verify them by the record. If such statements are made through inadvertence, well and good; if they are deliberately made then we have nothing to say further than to express our belief that they are indicative of the desperate straits appellee finds itself in in attempting to meet vital points of the attack made on its proof of its quantum meruit case.

The statement to which we specially call attention now is the one italicized at the top of p. 88 of the brief. Adamson was absent during the progress of the "Hilonian" work on five days, August 29th, Sept. 5th, 12th, 19th, all Sundays (opening brief, pp. 40, 41), and Sept. 6th, a holiday (id. 42). For these five days of absence Adamson vouched for the correctness of the time of the following workmen, 31 in all: Mockel; Benson; Stimmel; Boyer; Strowenjans; Martiolo; McDonald; Kasener; Wilson; Larrando; Pennycott; Thomas; Gus Albers; David Doig, Jr.; Turner; Furman; Williams; M. W. Albers; Hay; C. Schmidt; Wodjacki; Schafer; Chandler; Young; Holmquist; Read; Mello; Bouick; Higgins; Francisco; William Schmidt.

Counsel says:

> "Apprehending the question that would be raised by respondent respecting this time, as well as the time that Adamson was absent from the works, we took the precaution *to specially call the particular*

men who had worked upon the Hilonian job during the time that Adamson was so absent.''

(pp. 87, 88.)

If this statement found confirmation in the record, it would cure the lack of proof which theretofore had existed, even if it did not heighten one's confidence in Adamson, but as a matter of fact counsel's all embracing statement has barely one-half of truth in it, for he calls but 15 men out of 31, and Chandler, one of the 15, although so *''specially called''* to *''testify directly with respect to that particular time,''* namely: the time shown on his cards of Sept. 5th, 6th and 19th (I, 232), is only asked about the cards of Sept. 5th and 6th, and then only replies: *''They are both in my handwriting'';* and when opposing counsel asks if these two are cards that Adamson *failed* to identify he replies: *''Yes, that is all''* (IV, 1421).

In the foregoing enumeration we make no reference to any of the time of men working *at night* during the 22 days of Adamson's absence, and, were we to go to the labor of segregating from the cards of the 73 men vouched for by Adamson, those covering these 22 nights, and should add the new names so segregated to our list, we are confident that the inaccuracy of counsel's statement would appear even more clearly.

Adamson's Personal Cards of August 25th, 26th, September 7th and 18th.

(Reply Brief, pp. 92-95.)

Counsel meets our argument under this heading (opening brief, pp. 43-45) first, by stating facts and

drawing inferences based on the *existence* of these cards, and secondly, by *hinting at their possible loss.*

On the threshold of the direct examination of Adamson counsel laid the foundation for the introduction of all the time cards by showing that the witness possessed the essential requisite of personal knowledge of the time worked by each man on each job. Here was how it was done:

> Q. What do you do with respect to the time or noting the time that the man at the machine takes the job and the time when he finishes it?
>
> A. I take note of when I give the man the job and I know when the job is finished, and the time it comes off that machine, and then I know what time he has been on it, I know how long it takes.
>
> (Adamson, I, 191.)

If this evidence is not the sole basis of appellee's right to use Adamson as a medium through which all these time cards have been introduced as independent evidence of the facts they record, then, what is? It is not a question of inference on our part, but it is a recorded fact, without which libelant's proof would go a-glimmering. That this evidence states the only means through which the witness meets the legal requirement entitling him to vouch for the time on these cards is not only our contention, but it must be counsel's also or his proof fails, for Adamson's *"good idea"* falls far short of the legal requisite. It is said:

> *"This contention, as to his means of keeping track of the work, is based upon a single sentence in the testimony and closes its eye to the further statement, that, keeping track of the men's time was the special business of Adamson, the very purpose for*

which he was appointed, and the surface table was only referred to as one of the means to that end.''

Counsel is wandering. Work at the ''surface table'' is not the basis of Adamson's qualification:

I take note of when I give the man the job and I know when the job is finished, and the time it comes off that machine, and then I know what time he has been on it, I know how long it takes.

This and nothing else fills the legal requirement. That he says keeping track of the men's time was his special business, ''the very purpose for which he was appointed'', is immaterial as affecting in any way *how he did it.* If he did not do it in the way he says he did, how then did he do it? The surface table work may have been the initial means by which the witness was placed in contact with the ''Hilonian'' work, which he afterwards turned over to the men, but his sole means of *keeping time* on this work was the result of actual contact with the men in their doing of it, as he has so plainly stated. Counsel closes this phase of his reply with *inferences* too puerile to need attention (see last paragraph on p. 93).

As an alternative proposition counsel hints at a possible loss of these cards. He says: *''That four cards that should not have been discarded or destroyed should have been lost in this segregation is not at all remarkable.''* And then he adds *''Without doubt, owing to the multiplicity of matters occupying the libelant in the prosecution of the case during that time, the explanation was forgotten'', etc.* What does counsel now desire the court to understand? That

these particular four cards of the twelve hundred odd that had been segregated from many thousand others were subsequently lost? If so, why hint at it? Why not frankly say that these cards were lost and, if lost, why was this not proven when they were called for? The proceedings at the time are illuminative.

The first request for the cards' production was made during the cross-examination of Adamson, and was as follows:

> Mr. McClanahan. Mr. Frank, will you please produce Adamson's time cards for September 5th, 6th, 7th, 18th, 19th, August 25th and 26th?
>
> (II, 464.)

(It will be remembered that subsequently we found from Adamson's clock cards that he was not present on September 5th, 6th and 19th.) Our next request was made on the same day both before and after the noon recess:

> Mr. McClanahan. With the possible further cross-examination with reference to the cards that I have asked you to produce. I have now finished with the witness.
>
> Mr. Frank. Then we had better take an adjournment until 2 o'clock.
>
> Mr. McClanahan. Will you have the cards then?
>
> Mr. Frank. We will look for the cards.
>
> Mr. McClanahan. All right.
>
> (A recess was thereupon taken until 2 p. m.)

Afternoon Session.

Robert Adamson, recalled.

> Mr. McClanahan. Did you get the time cards, Mr. Frank?

Mr. Frank. No. Do you think there will be much more cross-examination, Mr. McClanahan, after you get the time cards? I would like to take up my examination all at once.

Mr. McClanahan. I think there will be very little more cross-examination after I get those cards, the cards of September 5, 6, 7, 18, 19 and August 25 and 26.

Mr. Frank. What are you repeating them for? We had them in the record this morning. * * *

(II, 470-471.)

And thereafter the cards were never produced nor was there the slightest suggestion ever made of their loss.

Under these circumstances we submit that we have properly drawn the inferences shown at pages 44 and 45 of our opening brief.

Answering our further contention that if these withheld cards *do* show "Hilonian" work, then appellee's bill is incorrect to the extent of the unknown number of hours shown by the cards, counsel says that this is not a matter for complaint for the error is in appellant's favor "and the loss is the loss of the United—*those hours not being charged in the bill*". Here is another of counsel's astounding statements. This bill was made up, if we can go by its date, September 27, 1909, and was compiled from the cards that had been turned in *at that time*. What then is the basis for counsel's statement that those hours were not charged in the bill?

Fearing that the court might not look with favor on either of its contentions with reference to Adam-

son's missing cards of these four dates, appellee concludes discussion of the subject by making a *"suggestion"*, in order to keep the court from being misled with respect to the proof of the time of the men covered by the dates under discussion,—in short, even though the circumstances should point to failure of legal proof through Adamson, the proof was later on supplied by the men themselves. And this *"suggestion"* is made *"so that the court will not be led into error with respect to the men's time"* (95).

Counsel is again becoming careless or at least is unfortunate in the use of words to express facts for, when he then says: "That a large number of Adamson's *exhibits* were resubmitted *to the men themselves* to prove their verity, both in respect to overtime, night work and *work covered by the dates mentioned"*, his words carry an inference at least that is even farther from the truth than the analogous statement made with reference to the other dates, which we have characterized as being barely half truth. Despite counsel's broad statement to the contrary we do contend, *without the slightest fear of contradiction*, that Adamson's exhibits covering August 25th, 26th, September 7th and 18th were *"resubmitted"* to only *eight of the thirty-four* men mentioned on page 43 of our brief, and that there remained the cards of twenty-six men of those dates *entirely depending upon the Adamson proof.* We correct counsel's *"suggestion"* for the same reason that it was made: *"That the court will not be led into error"*.

The Allowance of 9 Hours for Shop Work When but 8½ Hours of Work Were Actually Performed.

(Reply Brief, pp. 95-99.)

If there be found in our opening brief on this subject (pp. 53-56; also pp. 126, 127) any justification for the charge that our contention on this subject *"is again an evidence of his unfairness in his treatment of the case"*, we trust the court will deal leniently with this persistent frailty with which, in counsel's mind, we are obsessed. Our *unfair* contention amounts to this:

That in the ascertainment of the reasonable value of a thing, *based on its cost,* it is inequitable to include in such value a *profit* on an exigency of the cost for which the buyer receives no return, and that to do so is to establish a value not *reasonable* but unreasonable.

Secondly, our *unfair* contention amounts to this: That in the ascertainment of the reasonable value of a thing, *based on its cost,* it is fatal to libelant's proof not to show that the unemployed time which respondent is called upon to pay for, *with a profit,* is not equally distributed in cases where the workman in one day works on several different jobs.

And lastly, our *unfair* contention amounts to this: That in the ascertainment of the reasonable value of a thing, *based on its cost,* it is unjustifiable to include, as part of such value, a charge for the use of air tools during a period when they are not used.

There is but one statement of counsel on this general topic which we feel requires further answer. He says:

"The profit that the iron works obtains from a given job is a gross amount; it is the difference between the cost of performing the work and the amount it receives" (97). This statement, we assume, applies to the case at bar and, if so, it is misleading. We are not discussing a gross profit, but have under analysis the *details* of such gross profit. Practically libelant's entire profit, as shown by the record in this case, is covered by the difference between what it pays for its labor and what it bills it at. Its billing rate carries a profit and, if it is applied, as in this case, to unemployed time, of course, it is evident that a profit is being made on such time. We can hardly be criticized for using libelant's own billing rates for labor in this argument, especially as the proof is that, *"It was a good, liberal rate over and above cost, and carried a good profit with it"* (Gardner, VII, 2338). If it was an *"improper"* rate the record fails to disclose that fact.

Counsel's defense of bonus time for air tools is found at page 125 of brief and can be briefly answered. Reference is made to the charge on Schedule 1 of the libel:

"Air tool hand operator 1023 $1.25 $1278.75"

Counsel then says:

> *"In this charge the per hour rate of the tool is reduced the same as the per hour rate of the man; consequently to equalize the charge, the air tool time must correspond with the man's time. Had this time not been made to correspond with the man's time the $1.25 must have been increased correspondingly."*

We must admit in the first place that we do not know what counsel is talking about. In the next place his statement that in the charge this per hour rate of the tool and the man is *"reduced"* is entirely gratuitous, without a word of the record to support it. And lastly, if the two sentences quoted have any meaning or applicability to the subject matter of our charge that air tool bonus time is billed to us, they point to an admission that such is the case.

Overtime.

(Reply Brief, p. 99.)

Answer is first made on this subject to our contention as found at pages 56-57 of our brief. At that place we have taken a simple illustration to point to the injustice of these overtime charges *when coupled with the bonus or unemployed time which we had just discussed,* and we are frank to confess that we are unable to comprehend the point of counsel's criticism of the illustration. If a man's shop card shows 9 hours of straight time and one-half hour of overtime, he has *worked* but 9 hours, yet he is paid for 9 hours straight time and one-half hour overtime. This is perfectly apparent but counsel's criticism is not applicable. Let us paraphrase it to illustrate the true situation: "In other words, respondent is billed for 10 hours time at 65¢ an hour which equals *$6.50.* If, however, the *rate* had been doubled instead of the *time,* the charge would appear thus:

9 hours at 65¢ = $6.50, and
½ hour at 1.30 = .65, which
being added together = *$7.15* "

The 10 hours billed at the straight 65¢ rate are made up of 9 hours straight time and one-half hour overtime *doubled.* The trouble with counsel's illustration is that even though it had been stated properly it means nothing as an answer to the contention of our brief.

Putzar's Position and His Relations to the Parties.

This discussion consumes nearly nineteen pages of appellee's brief (100-119), but we shall find no difficulty in answering in brief space what counsel is pleased to call our *"tirade"* upon Putzar's relations to the appellee. While we shall remain mute as to the many personal attacks under this heading, we shall certainly correct some of the statements of fact made. Let us start out with this as a preliminary suggestion:

While Putzar's time sheets properly proven may be prima facie evidence of the time thereon recorded, it nevertheless was appellant's right to overcome this prima facie case by showing that the time sheets represented no more than matter copied from appellee's time cards, and that Putzar did not keep an independent record, in which case the prima facie showing would, of course, be destroyed. It was our further right to show the *probabilities* of our contention by drawing attention to the relations existing between Putzar and the appellee for, if these relations were to any degree intimate, they would have some bearing on the question of how far Putzar might have been

influenced by the time cards presented to him as *appellee's* showing of the time. A showing of close and friendly relations might have some bearing on the probabilities of Putzar *taking for granted* the correctness of appellee's cards and, moreover, if such relations existed and did have some part in Putzar's action, surely it would not call for an attack on the man's integrity and reputation, such as is said we have made, but which we emphatically deny. In an honest though misguided conception of his duty Putzar may have adopted the time card record as his own in the belief that, as the appellee was paying its men on that record, there could ordinarily be no reason to doubt its accuracy, especially as the time which necessarily must have been consumed in keeping an independent record could be more profitably spent in other work. This we say might well have been Putzar's conception of the proper performance of his duty, and to say so does not carry with it any imputation of dishonesty or fraud, nor did anything done by us or disclosed by the record carry such imputation. We were, as was our right, meeting appellee's prima facie showing by putting before the court the relations of the parties as bearing on the probabilities touching our contention of the work being copy work, as well as our reason why he was not called by one party and could safely have been called by the other. And the showing of the relations between Putzar and appellee does not, nor was it intended, to "cast suspicion upon the integrity of their transactions", as stated by counsel.

Now, briefly, as to a few of counsel's statements of fact. It is said at page 109: *"That Putzar kept an independent time book is not disputed * * *"*. And again: *"Now we say it is admitted that Putzar kept an independent record in a hand book"*. How can counsel make these assertions? Why, the very crux of our contention, as the court knows well, is that such was not the fact. Where does counsel find support in the record for these remarkable and material assertions?

Again, at page 113, in speaking of Putzar's independent record of night time work, it is said:

> "There was also some night work after Mr. Putzar was appointed engineer, *during which time it is conceded that he was on board.*"

We emphatically deny any such concession, and ask that counsel substantiate the statement from the record if he can, or even meet the inferences to be drawn from the following testimony:

> Q. Were you on there every night when work was being carried on by the United Engineering Works?
>
> A. Yes, sir.
>
> Q. Did you ever see Mr. Putzar on the ship at night?
>
> A. I don't remember ever seeing him on at night, he might have been there though.
>
> (Klitgaard, VI, 1925.)

> Q. Did Mr. Putzar occupy a room on the Hilonian during the repair work?
>
> A. He did not.
>
> (Kinsman, V, 1872.)

Again will counsel substantiate this statement referring to the *night shift in the engine room:*

> "These men were checked off when they went to work in the evening, *at which time Putzar was present.* In the morning they were checked off by the night foreman and the day foreman, *in which checking again Putzar was present to take part.*"
>
> (p. 111.)

The only reference made to this checking off of the men as they went *on* and *off* the ship is that made by Kinsman, referred to at p. 91 of the opening brief, while Siverson says:

> "I know that he (Putzar) *was counting the men every day.*"
>
> (Opening brief, p. 90.)

Siverson was the *day* foreman and his statement does not support counsel's sweeping assertion of Putzar's presence and participation in the checking off of the engine room night shift morning and evening.

Under this heading we desire to correct counsel in another misapprehension. We are informed there is a great difference between keeping time *on the ship* and time *in the shop* (p. 110), and that such difference lies in the lack of necessity to *segregate* the time on the ship, and in the matter of engine room night work in the fact that the work is said to be "*homogeneous*". These contentions both show a forgetfulness on counsel's part of appellee's legal obligation in this case, which is to prove the reasonable value of the work

done. To do this it is primarily necessary to prove the reasonably necessary time that it takes to do the work. Appellee has seen fit in order to meet this primary requisite to show the time *actually employed.* Putzar's time sheets do not meet this proof since Putzar is not shown to have had knowledge of such *actually employed* time. His knowledge that a man goes on the ship at one hour of the evening and comes off at another hour the next morning is clearly insufficient to establish legal proof of the requisite fact of the time worked by the man in the Hilonian engine room. The fact, as contended for by counsel and used in extenuation of Putzar's claimed independent timekeeping, that in keeping ship time there are no job numbers or separate jobs to be segregated, and that the work is "homogeneous", has nothing to do with Putzar's requisite knowledge of the time actually worked by the night shift during the 23 days in question. And, by the way, where does Putzar get his knowledge of a man's night work being *"homogeneous"*, that is, that he *"worked the entire time upon a single job"*, except from seeing the time card entry of that fact.

Lastly, in answering our contention as to time sheet entries from Sept. 17th to 24th being made by Curtis (opening brief, pp. 110-113), it is said that *"It is immaterial who did the clerical work of transferring the time to these sheets."* If this statement is intended to apply to the requisite proof appellee must make in this case, then we submit its truth is wholly dependent upon

whether it has been shown, first, that Putzar kept an independent record of the time from Sept. 17th to 24th, and second, wehther that record being kept had been compared with the time cards and found to harmonize, for it will be remembered that the time sheets covering these dates are admittedly but a resume or copy of the time cards, and the copying done by Curtis was after the work on the "Hilonian" was finished (V, 1528), so that Putzar's signature after the printed statement: "Time on board correct" was placed on these sheets after his agency as timekeeper had ceased. And why that signature appears on appellee's copies and not on appellant's has yet to be explained (opening brief, 113).

Answer to our overtime contention (opening brief, p. 122) as applied to Putzar's time sheets is found at p. 126 of the reply brief. Briefly stated, we contend that it is no part of the reasonable value of work, *when based on its cost,* to include payment of overtime unless the workman has *first* worked straight time *for our account.* Counsel's sole answer to this contention is that we have made errors in our list of "instances" found on p. 125 of our brief. In this matter of errors we admit counsel is right. Of the 34 instances cited by us 13 are clear errors and 4 are errors only in the sense that they do not substantiate our statement that they show *no* straight time worked. As a matter of fact they show that the workman is allowed overtime before he has worked

his *full* 8½ hours of straight time. These latter instances are:

> Aug. 30, workman No. 100; and Sept. 16, workmen No. 355, No. 512 and No. 538.

Counsel's list correcting ours is wrong as respects the Sept. 22nd time of workmen No. 325 and No. 568. The fact that these men worked *only at night* 10 hours and 8 hours respectively, does not affect our contention that they are not shown to have worked *for our account* their appropriate 8½ hours of straight time. Counsel says of our *correctly* cited instances that they do "not prove that the men had not worked straight time, because if a man worked his straight time on *another job* and overtime on the Hilonian, only the overtime would appear on the sheet". This, the court will see, is the very point of our contention, and that it represents the true status of appellee's quantum meruit charge as regards both ship and shop work, irrespective of our erroneously cited instances, is shown by the testimony of Adamson and Curtis cited at pp. 123 and 125 of our opening brief. (The word *"ship"* found on the 16th line from the bottom on p. 123 of our brief should read *"shop".)* If counsel's answer on this matter of overtime had been to reiterate Curtis's defense; *"The explanation was made and settled with the timekeeper"* (V, 1559), we submit there would have been more point to it.

The fact that Putzar *"separately entered"* on his sheets a man's straight time under one job number and overtime under another, counsel says, is *"con-*

clusive proof that he was not copying the cards, because each man's card carried upon its face both his straight and overtime''. We do not think counsel has expressed himself quite as clearly as he might in making this statement. He certainly does not mean that Putzar did not *copy* the cards onto the time sheets. Any such idea is distinctly repudiated by the record. Curtis says on his direct examination:

> "In this case Mr. Putzar transcribed them onto the sheets and he checked them up on these sheets from his hand book."
>
> (IV, 1430.)

And again on cross examination:

> Q. Do you remember, Mr. Curtis, that you have testified that Mr. Putzar entered the time cards into his time book?
>
> A. Yes, this book here.
>
> Q. Is that correct?
>
> A. This printed book.
>
> Q. These time cards having been checked by you and turned over to Putzar as correct were entered by Putzar in the printed time book?
>
> A. Yes, they were entered.
>
> (V, 1510.)

And again:

> Q. You ever (never) saw him actually entering the cards onto the sheets?
>
> A. I did at one time, yes.
>
> (V, 1513.)

Furthermore, after the time sheets and time cards had been finally placed in Curtis's hands, they were

checked up by him and found to correspond, and to be without error (IV, 1492). If counsel means that because Putzar separately entered on his sheets a man's straight time under one job number, and overtime under another, there is found *"conclusive proof"* that he was keeping an independent record of the man's time *"because each man's card carried upon its face both his straight and overtime"*, we cannot agree with him. If the cards are transcribed onto the sheets, it certainly follows that there must have been transcribed the man's record of straight and overtime, whether worked under the same or different job numbers for, under appellee's system, the card is supposed to furnish such data and the vice of the matter is found in the fact that the apportionment of such straight and overtime is left to the workmen.

Admissibility of Putzar's Sheets and the Time Cards.

(pp. 131-134.)

Not only is our contention on this subject relative to the *time cards* met by an attempt to invoke the hearsay rule as it applies to the common law exception of tradesmen's entries made in the ordinary course of business, but counsel has the additional temerity to include Putzar's *time sheets* in such attempt. It is said:

> "By this means, the cards themselves and the time sheets are admissible not only because we have proof in the one case of their verity by a party who knew the facts, and in the other case

> by proving the signature of Putzar to the sheets, supplemented by the testimony of Mr. Curtis as to the correctness of the sheets, but *also upon the principle that they are in effect the account books of the libelant,—regular entries in the due course of business.''*

Counsel, however, does not stop here with this really remarkable statement, but with a blandness equally astounding contends that this position was taken by him *''at the time the testimony was offered''*.

As regards the time cards, of course, the *''testimony''* here referred to is Adamson's, for the substantiating reference is Vol. II, 412, where we find the following:

> ''Mr. Frank. I object to the entire question upon the ground that it is not a question of refreshing memory at all but it is a question of the regular course of his business, whether or not he passed on those cards, whether checked or not checked at the time they were handed him as he knew them then to be correct.''

This *objection* of counsel's said to embody his contention of the cards' admissibility under the exception to the hearsay rule, *''regular entries in the due course of business''*, was not expressed *''at the time the testimony was offered''*, but found utterance during Adamson's *recross examination* (II, 398) and, as the context shows, was an attempt by suggestion to rescue the witness from an embarrassing position into which he had got himself by his *''check mark''* testimony. The record does not reveal a word suggesting that these time cards were offered as counsel

expresses it: as "regular entries in the due course of business". On the contrary, appellee's entire case is built on the theory of Adamson's *personal knowledge* at the time of the correctness of the time shown on the cards. We have already had occasion to refer to the manner in which Adamson was qualified by counsel to meet this theory and thereafter, when the first of the time cards is presented to the witness, this question is put:

> Q. State whether or not you kept this man's time and checked it up?
>
> (I, 198.)

Later on, during the progress of the case, when we were appealing to the court against appellee's refusal to disclose the "Hilonian" job numbers, we find counsel stating the purpose and object of Adamson's time card testimony as follows:

> What I am doing is, proving by this witness at this time that the entries on those cards were correct, checked up by him and known to be correct at that time.
>
> (II, 355.)

And again:

> Here is a man that has a card which he checks up, and all of his testimony is simply to this effect, that this card is checked up by him every night, and when checked up is known by him to be a correct transcript of the jobs on which the man worked and the time he put on these several jobs.
>
> (id., 359-360.)

We submit the hour is late to change the theory on which appellee's case was tried, or the theory on which Adamson vouched for these cards. Even the discovery of a Circuit Court of Appeals decision, which counsel thinks fits the new contention, would be insufficient justification. However, we will distinguish counsel's newly found case *(Wisconsin Steel Co. v. Maryland Steel Co.,* 203 Fed. 406) by a simple recital of the circumstances under which the statement of law in this case *might have been* made applicable to the case at bar.

It will be remembered that Curtis, in referring to appellee's billheads, said:

> A. These headings are the result of the consolidation of the *reports of the work furnished by the different foremen* of the different departments of our yard.
>
> Q. What office do they perform as a record in the office of the United Engineering Works?
>
> A. *They are the original record. It is the only record that we keep.*
>
> (IV, 1428-1429. See also Christy, IV, 1260.)

If, instead of the foregoing, it had been shown, *by one charged with the duty to keep, in pursuance of an established system, an original record in permanent form, showing the time, consolidated or otherwise, employed on a particular job,*—such record, though compiled from workmen's time cards, would have been admissible to show such time, and the *time cards* themselves could have been used as furnishing the *requisite "circumstantial guarantee"* of the verity of the record.

This is the law of the case cited and nothing more. Its inapplicability to the facts of the case at bar is too apparent. Neither "in effect" or otherwise are the time cards or Putzar's time sheets the "*account books*" of appellee. On the contrary, the only theory on which the time sheets could be used to establish a prima facie case is that they are *declarations against interest,* and we feel some embarrassment in even making reference to a legal truth so obvious.

As to the time cards, if they be not appellee's "*account books*", and if no such books are in fact shown to exist, then we see no reason for changing our previously expressed opinion as to their use being limited to a "*memory assistant*".

Concluding this subject counsel refers to *Miss. Riv. Logging Co. v. Robson,* 69 Fed. 781, in which he says the opinion

> "*considers not alone the admissibility of such evidence as the time cards and Putzar's time sheets, but also holds that under the circumstances, they are better evidence than the memory of the workmen themselves.*"

This statement is as foreign to what the opinion in that case is directed to as it well could be. The question there was as to the admissibility of certain *books* kept by one of the parties containing data taken from memoranda made by workmen, which data so entered was from time to time verified by inspectors and found to be correct, and thereafter acted upon by the parties and used as the basis of their dealings with

each other. And further, whether these *books* were better evidence of the facts thus recorded than the *unassisted* memory of the workmen themselves. There is no possible analogy between the time cards and Putzar's time sheets in this case, and the *books* referred to in this decision.

Let us refer the court to a decision by Judges Taft and Lurton sitting in the Sixth Circuit, which we believe will be found helpful:

Chicago Lumbering Co. v. Hewitt, 64 Fed. 316.

The proof to be made in this case was the lumber contents of certain logs placed in the river above defendant company's boom, from the camp of which a man named McFadden was foreman. The facts are fully stated and show that McFadden testified that at the time in question he was looking after the lumber operations at that point, and that a quantity of logs put into the stream were scaled by one, Foley; that witness's duty was to see that they were scaled in good order; that said Foley kept a tally of his scales on tally boards hung on a wire, and that this tally was kept in pencil and rubbed off at night; that every evening the witness and Foley would sit down and figure up from the tally boards the quantity of logs so scaled during the day, and Foley and the witness set down in a *scale book* the date and total number of feet scaled during the day according to said tally boards; that he examined Foley's scaling sometimes twice, sometimes three or four times a day; that the scale book gives the tally of the logs scaled. Evidence

was also given that tended to show that Foley could not be found so as to obtain his testimony in regard to the scaling. This scale book was offered in evidence on this testimony and received by the trial court over the objection of counsel that it was hearsay. Other testimony of like character as to logs scaled by other scalers was offered and also received over like objection.

Judge Lurton, in speaking for the Circuit Court of Appeals reversing the ruling of the lower court, gives expression to much that is appropriate to the case at bar and, though we commend to the court the reading of the decision in full, we make the following quotations which will point to the analogy shown. In referring to the scale book it is said:

> "It is true that the book is one which had been kept by the witness, and the entries offered had been all made by him. But it is equally true that the data upon which those entries had been made had been obtained from another, and that the witness had no such personal knowledge as to the correctness of these data as to enable him to say anything more than that he had correctly recorded the results obtained from data furnished by another."

And again:

> "The difficulty in this case lies in the fact that the book entries were made from the tally board memoranda by a person other than the one who made the tally board entries, and who knew nothing of the correctness of the data transcribed."

And again:

> "Mr. McFadden's book could not refresh his memory as to the facts sought to be established by his entries for the obvious reason that he had no personal knowledge of the truth of the facts recorded by him. That the book was not admissible to refresh McFadden's memory is therefore most obvious."

And again:

> "Whether memoranda made by a witness of facts concerning which he had personal knowledge are admissible as independent evidence, or for any other purpose than to refresh the memory of the witness, is a question upon which there is great conflict of authority, and an open question in the courts of the United States. Bates v. Preble, 151 U. S. 157, 14 Sup. Ct. 277."

And again:

> "The book involved is not what the common law rule denominates a 'tradesman's book'. In no true sense was it a book of accounts at all. At most it purports to contain memoranda made contemporaneously with the fact which they purport to record. That fact is the aggregate lumber contents of the logs placed in the river on each of a series of days from a lumber camp above the saw mills of the company, for which they had been cut. If admissible as independent evidence at all, it must be, not because the book is technically an account book, but upon some rule making memoranda made by a witness admissible as independent evidence of the truth of the facts thus recorded."

Reference is then made to *Chaffee v. U. S.*, 18 Wall. 516, where the court in that case said that for the admissibility of such entries the rule required,

> *"not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts and be corroborated by their testimony, if living and accessible, or by proof of their handwriting if dead, or insane, or beyond reach of the process or commission of the court."*

It added:

> *"This knowledge of the party making the entry* is essential to its admissibility."

It will be noted that in the case at bar the time card entries were not made by Adamson at all. Referring to the argument that Foley could not be found, and that, therefore, the memoranda made upon his knowledge were admissible, Judge Lurton said:

> "So in this case Foley was a competent witness to the correctness of the memoranda shown by the tally boards. Did the book kept by McFadden become competent independent evidence because Foley could not be found and produced as a witness? There is nothing, when rightly understood, in either Chaffee v. U. S. or Nicholls v. Webb, which will justify such a conclusion."

And again:

> "Now, if McFadden had made these entries from his own personal knowledge, the book might have been competent evidence for the plaintiff upon evidence of that fact, and of the further fact that he was 'dead or insane, or beyond the reach of the process or commission of the court'."
>
> * * * * * * *
>
> "As the entries were not made by Foley at all, the book not being one kept by him his declarations either written or verbal were incompetent as supplementing a book which he had not kept."

And again in conclusion:

> "The failure of the appellees to produce Foley was doubtless due to their great laches in bringing this suit; several years having elapsed after their action accrued before this suit was begun. Their negligence should not operate to place their adversaries under a disadvantage consequent upon being subjected to the effect of hearsay evidence."

While the facts of this case are not directly analagous it will be seen by a process of transformation that some of the points are very helpful to a proper determination of the law of the case at bar. If the theory of the admissibility of the time cards was not based on them as a *"memory assistant"*, but they had been introduced as *independent* evidence, then the case is squarely in point both as affecting Adamson's exhibits and the cards introduced through the medium of Curtis. It will, therefore, be in order to refer briefly to the extent to which this last witness's testimony meets the legal requirement.

Curtis identifies the handwriting of *some of the cards* of 9 of Adamson's men as follows:

David Doig, Jr. (in Alaska), 3 cards out of 15, Adamson's Exh. 63, 64, 65. (IV, 1441.)

G. W. Higgins (unable to locate), 1 card out of 4, Adamson's Exh. 19. (IV, 1453.)

Dunne (in Europe, told so), 1 card out of 3, Adamson's Exh. 77. (IV, 1453.)

Furman (unable to locate), 3 cards out of 15, Adamson's Exh. 107, 117. (IV, 1454.)

Holmquist (unable to locate), 1 card out of 2, Adamson's Exh. 112. (IV. 1454.)

Reade (unable to locate), 2 cards out of 2, Adamson's Exh. 122. (IV, 1454.)

Albers (unable to locate), 1 card out of 3, Adamson's Exh. 137. (IV, 1454.)

Williams (unable to locate), 4 cards out of 11, Adamson's Exh. 127, 128. (IV, 1454.)

Wm. Schmidt (in Peru, told so), 5 cards out of 16, Adamson's Exh. 94, 95, 96. (IV, 1453.)

The following is a resume of Curtis's testimony relative to the cards of men *not* mentioned by Adamson, but offered solely upon the witness's knowledge of their handwriting:

Chas. Linde (in New York). (IV, 1437.)

O. Haglund (weak minded). (IV, 1443.)

John Knight (dead). (IV, 1445.)

P. Larsen (unable to locate). (IV, 1446.)

Chas. Vaccarez (in Alaska). (IV, 1447.)

Jas. Noleroth (in Los Angeles). (IV, 1448.)

Jack Dominick (no showing), (IV, 1447.)

Ed Smith (unable to locate, and card not in Smith's handwriting). (IV, 1450.)

Joe Perry (unable to locate). (IV, 1451.)

Lastly, we submit under this head, that the use or admissibility of the time cards should in this case be governed by the state law. Although this suit was

brought in a court of admiralty it could, with equal propriety, have been brought as a common law action in a court of the state, in which event the state law governing the use or admissibility of these memoranda would have been followed. As, however, appellee has seen fit to take the matter into a federal court of admiralty, there seems no good reason why such court should not apply to the controversy the same law the state court would have applied, especially if it be found that there be no federal rule repugnant to the state rule. Were this action brought as one at common law in the federal court, the law of California would, of course, be followed (see Revised Stat. §721), and we submit it still should be followed in admiralty where the sole contention is the determination of the value of work done under a contract made in the state by residents of the state. The only California statute governing the use to which memoranda of a fact sought to be proved can be put, is found in §2047 of the Code of Civil Procedure, which reads:

> "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the par-

ticular facts, but such evidence must be received with caution."

From this it will be seen that under the law of this state these time cards are not admissible as independent evidence, and can only be used by the *writer* of the card to refresh his memory. Though, if the writer of the card retains no recollection of the particular facts, he may still testify from his memorandum, but such evidence must be received with caution.

In this case the cards were not written by Adamson or under his direction and they, therefore, under the law of this state, could not have been used by him, much less introduced through him as the medium, as independent evidence of the facts to be proven (see *Stewart v. Morris,* 88 Fed. 461).

Appellant's Proof of Value of All Repairs.

(pp. 134-143.)

If we may assume that this court sustains our contention that there was a contract for doing the specification work, and thereby necessarily finds that the disputed Schedule 1 is compounded of such contract work and quantum meruit work, which appellee failed to segregate though requested to do so before suit, and that as a result appellant has been forced through the exigency of this litigation to not only perform the task of making such segregation but of valuing the

quantum meruit work so segregated; then, we reiterate what was said in our opening brief at p. 181: "That under the circumstances libelant's criticism of respondent's proof of value" should not find favor. Were there the slightest merit in counsel's criticism a conclusive answer would be found in that part of our brief which counsel does not deign to notice (pp. 176-181). But the criticism of our experts and of our manner of proving the value of this work is without merit. Counsel seems to have some premonition along these lines for we find him, after referring to our suggestion that appellee's case as to values be proved by experts, as an invitation to enter upon "a guessing contest",—launching into a euology of both Gray and Curtis in an attempt to qualify them as experts on the question of the reasonableness of the bill. Counsel's references to substantiate the contention that he has introduced the evidence of better qualified experts than appellant's is worth while examining:

> Q. Now, Mr. Curtis, you have been at this work a great many years, have you not?
>
> A. Yes, sir.
>
> Q. And you are familiar with the customary prices for the different articles used and set forth in this bill Schedule No. 1. A. Yes, sir.
>
> Q. State whether or not the prices charged for these several items in Schedule No. 1 are the usual and customary prices charged at this port for that class of material?
>
> A. They were the usual and customary charges in this port at that time.
>
> (IV, 1472.)

Counsel seems to have forgotten that Mr. Hough proved for him that the *material charges* on Schedule 1 were usual and customary, and that we did not attempt a word of cross examination on that subject, thereby practically admitting the matter.

We submit that counsel's substantiating evidence with reference to *"expert"* Curtis, was not worth the time taken to refer to it.

As to counsel's reference to Mr. Gray's testimony: "That in their (his) opinion the amount charged in the bill was a reasonable charge for the work performed", we find that it consists of the following, brought out on *our cross examination:*

> Q. As a matter of fact, Mr. Gray, you have felt all along that your bill was high, have you not?
>
> A. I felt that the bill was just under the conditions.
>
> Q. You have felt that it was high, have you not?
>
> A. For the length of time the work was done in the bill is not too high, the amount of work that was done in that period of time.
>
> (VII, 2466.)

May we here be permitted to add some further testimony on the subject of expert Gray's opinion, Gray being the only member of the United's triumvirate who, when appealed to by Hough with the request: "You fellows leave me alone", replied: *"I am helpless. I have nothing to do with the case"* (IV 1390).

Klitgaard, Gray's friend, though our expert, testifies:

Q. Mr. Klitgaard, did you at any time ever discuss with Mr. Gray the value of the work which was done at this time?

A. Oh, yes, on several occasions.

Q. Was that before or after the controversy arose?

A. This was long before.

Q. Before the controversy? A. Yes, sir.

Q. What was the discussion?

A. As regards to how much the bill would be.

Q. What was Mr. Gray's opinion in that matter?

A. He thought it would go up to about $20,000, and was very much worried about it.

Q. He was worried about it?

A. Yes, sir, because the bill would go so high.

Q. That is the entire bill, $20,000?

A. Yes, sir.

(VI, 2010.)

Subsequently Gray takes Klitgaard for an automobile ride and Klitgaard tells him what his estimate is (made for the appellant after suit was brought) and he, Gray, *"made no comment on it at all"* (Gray, VII, 2465, 2466).

So much for *appellee's* expert testimony.

Turning now to appellant's, we are informed in one breath that neither Gardner nor Heynemann had any *"knowledge of what the work was that was performed"*, and in the next that "all their knowledge upon the subject was derived from what they could see of the *completed* work, and what they could not see was explained to them by Mr. Kinsman". This

apparent contradiction is explained by further saying that: "What they could see was only *finished work*", and "What was explained to them by Kinsman is hearsay purely".

Surely counsel is not purposefully forgetful of the fact that the basis of Gardner's and Heynemann's days of examination of this work was appellee's own billhead enumerating in exact detail everything that was done and charged for in Schedule 1. Each of the 140 items of this billhead received their personal inspection and, in cases where the item under investigation was covered up, the nature of the work was explained to them by the man who was present while it was being done. This, we submit, was not hearsay.

Is counsel also forgetful of the testimony of appellee's own foreman, Nelson, as to the distinguishability of this work, even at a date many months after Gardner and Heynemann's inspection of it? (opening brief, p. 191). The fact that what they saw was "*finished work*" is the very reason for the accuracy of their estimate. A man so situated, says Gardner, "*has an advantage in that there is no necessity for making allowances for unforeseen contingencies, which is usually allowed in making an estimate before the work is performed. You really do not know in many cases what will be necessary. The work having been performed, it is very evident what has been necessary and what has been performed*" (VI, 2223; see also Heynemann, VI, 2049). This reasoning appeals to us to far outweigh in its logic and reasonableness

all that was said in way of a contrary view by Mr. George Dickie whom counsel dignifies, we believe erroneously, with the gratuitous eulogy of having a national reputation. (He is confusing the two brothers for, to our knowledge, it is *Mr. James Dickie,* for nearly a quarter of a century the superintendent of the Union Iron Works, who is possessed of national reputation.)

Gardner's view on this subject is clearly to be inferred as the view taken by appellee itself, for Mr. Christy on cross examination, in referring to the itemized billheads, such as Gardner and Heynemann had in this case to guide them, makes this gratuitous statement:

> *"In so doing it we have these headings filled out of the actual work performed, and that is the record we try to keep—what is actually performed; not what a man originally proposed to do but what he ultimately is compelled to do through the various differences between the opinion of the man who wrote the specifications before he dismantles an engine and the actual results after it is dismantled."*
>
> (IV, 1263.)

Counsel's position all through has been along the lines here suggested by Mr. Christy,—emphasizing the difference between the situation *before* the engine is dismantled and the actual results *after* it is dismantled. Yet we find two of appellee's experts differing radically from this position and declaring that there are better facilities for arriving at a correct estimate by an examination before the work is done than by one after it is done (Dickie, VII, 2565; Ransom, VII, 2587, 2588).

While the third expert says that in both situations the estimates are valueless (Hopps, VII, 2551).

Were the opinions of these witnesses to be adopted, the vessel owner would be deprived of all means of checking the value of the work of a shop if it was disputed. As counsel says that the "circumstances attending the calling of Mr. Hough makes his testimony upon the subject of peculiar value" (p. 142), we will be excused for quoting from it.

> Q. Now, Mr. Hough, referring to the examination that you have undergone by Mr. Frank, do you mean to put yourself on record as saying that competent engineers, marine engineers, cannot, after having seen the work of repair which has been done on a vessel, estimate the value of that work?
>
> A. No, sir; I do not.
>
> Q. Is it not done every day? A. Yes, sir.
>
> Q. Is it not the only means that your principals have of determining the value of work?
>
> A. That is one of the means; yes.
>
> Q. Is it not the most accurate means of determining the value of that work after it has been done, inspecting the work and accepting the opinion of experts?
>
> A. I would not say it was the most accurate means. It is a means of checking.
>
> Q. A means of checking what?
>
> A. The cost of a piece of work as represented by the contractor.
>
> Q. That means is resorted to a great deal, is it not?
>
> A. In the case of experts.
>
> Q. The use of experts in checking the work and the price of work paid by a contractor?

A. Where there is any question as to the value of the work, but it is not the custom to call an expert to state the value of every piece of work done.

Q. But where there is a question, that is the means of checking the work, is it not?

A. That is the means; yes.

Q. Is it not the most accurate means of doing so?

A. I know of no other.

Q. You know of no other more accurate?

A. I know of no more accurate means than employing the best man I can find to know of that particular class of work.

Q. And show him the work, telling him what was done, and letting him see what was done as far as it is possible to see it and taking his estimate. That is the most accurate means of checking the work, is it not?

A. It can only be accurate provided that that man is shown all that is done.

Q. I say it is the most accurate means of determining the value of that work?

A. I think so; yes.

Q. *If that means did not exist and was not recognized, there would be no way of checking the work of a shop if it was disputed?*

A. *No, sir, I suppose not.*

(IV, 1381, 1382.)

The subject can be dismissed with but one further word. In this case the work *had been completed* before the controversy arose, and its examination *as completed work* by experts was the only means left open to appellant to dispute the correctness of appellee's bill, and yet this court is asked to ignore the means employed on the ground, first, that an estimate on completed work has not the same degree of accuracy

as an estimate made before the work is done, and second, an estimate under either situation is valueless. The result being that appellant, having no means of proving the incorrectness of the bill, must submit to it. The very statement of the consequences resulting from counsel's contention is so repugnant to one's sense of equity that it would almost seem an affront to make it in a court of admiralty. We do not criticize counsel's right to malign and discredit our experts and their work, but to say that a situation brought about by appellee's repudiation of its contract, as appellant claims, forbids recourse to the *only means* of rectifying the wrong is abhorrent to our conception of the principles which actuate this court.

Costs.

There is little to add to what has gone before on this subject. Counsel refers to the length of our cross examination, to which we might respond that his own cross examination was by no means meagre. Our cross examination was in no sense a fishing excursion or full of any improper inquiries, as we think the court will find. We also emphatically deny that the long delay from November 18th to May 1st was caused by us. We were not trying the Moore divorce case during that period (which was concluded early in December) and were only responsible for a small part of the delay. The case should have been closed long before November 18th and would have been but for the dila-

tory tactics pursued by the libelant and the cumbersome method in which it put on its case. If such a method of trial is to be pursued in future suits for work and labor it will, as suggested in our main brief, swamp the machinery of justice. The only way it can be stopped is by taxing the costs against the party responsible for it and, with all due respect to the lower court, we submit that there was a grave abuse of discretion in not so doing in this case.

Interest.

Counsel tacitly admits that interest is not allowable on a quantum meruit claim before judgment in California in ordinary cases. He says, however, that we admit that $19,568.32 is due on his quantum meruit claim and should, therefore, pay interest on this sum. This is a mere juggling with words. Our admission was that $19,568.32 was due on *both* contract and quantum meruit work, and is based on the theory that there was a contract. If the court finds that there was a contract we might have to pay interest on the contract price, but, if the court finds that there was no contract, our admission goes for nothing. Moreover, in practically every quantum meruit case there is an admission that at least something is due, yet interest is never allowed because the exact amount cannot be ascertained till judgment is rendered. No case can be found supporting this novel proposition now advanced for the first time, and we feel that there is no need to answer it further.

We also submit in this case, however, that even if the court finds that there was a contract, no interest should be awarded for two reasons: (1) that libelant has not sued on the contract but on a quantum meruit, and (2) a proper tender was made based on the theory that there was a contract. It is true that the amount of the tender was not paid into court, but we again submit that a tender is inappropriate in a case where respondent denies the whole theory on which libelant's claim is based.

Appendix I.

(pp. 1-60.)

The purpose of this appendix, other than to enlarge the printer's bill, is not apparent. It purports to be a "segregation of labor and hours worked and material used, together with a resume of Putzar's time sheets". If the "segregation" had been made applicable to the individual job numbers, or had been made so as to distinguish between contract work and extra or quantum meruit work, it might have been of some assistance, and such a segregation could have been as easily accomplished, but in its present form Appendix I is of no value for, if the court takes appellee's view of this controversy, it will govern itself by the pleadings and the record and not by this gratuitous ex parte appendix, which appellant has never seen before and which, in the absence of any statement of counsel's as to its materiality, we decline to examine or discuss. An examination of it may or it may not substantiate its title and, if it does, pray what of it?

Reply to Appendix II.

(pp. 61-80.)

This appendix is appellee's reply to sundry irregularities pointed out in our opening brief, and starts out with the statement that they are, *"with very few exceptions"*, unfounded. It would have been helpful if these "very few" *admissions* had been pointed out.

The court will bear in mind that most of the irregularities are referred to by us as showing that Putzar did not keep an independent record of time (opening brief, p. 114).

Wheel work and valve work on Sept. 10th (opening brief, 114; reply brief, 122-125).

Our criticism is directed to the contention that it was impossible for the work shown by Putzar's time sheets to have been done on the "Hilonian" wheel on Sept. 10th. Counsel, however, fails to catch the point, namely: that even though there might have been performed by the appellee 10 hours of straight time and 6 hours of overtime on wheel work (opening brief, 114), still, for such time to appear on Putzar's time sheets on Sept. 10th is evidence that he was not keeping an independent record of ship time, for on Sept. 10th it would have been impossible for that amount of work to have been performed on the *ship* and, if performed elsewhere, how is it that the time appears on Putzar's sheets?

(2) Sept. 14. W. Ross—Allowance of 12 hours when it should have been 15 (opening brief, 118; reply brief, Appendix 2, p. 61).

Appellee's answer is characteristic: Putzar did not correctly copy the time cards; the workman's card "*must have shown 15 hours*". We reply that he *did* correctly copy the card, for Curtis subsequently checked Putzar's time sheet copy work with the card and found them in harmony. Since appellee, after this checking, has deliberately *destroyed* the time cards, we can hardly express our admiration of counsel's presumption in saying "*the card must have shown 15 hours*".

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(3) Sept. 15. L. K. Siverson, No. 508 (opening brief, 119; reply brief, Appendix 2, p. 62).

Appellee's reply to our criticism under this head is as incomprehensible as it well could be. As showing that Putzar's was copy work, we point to the fact that on Sept. 15 Siverson is allowed 10 hours straight and 4 hours overtime on rudder work and 9 hours straight time on work on valves. Counsel's reply is: "The 9 hours last mentioned were put into *the wrong column*. The 9 hour entry on valves should have been in the *total column*." We regretfully confess our inability to enlighten the court as to what counsel means.

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(4) Sept. 17. Duplication of sheet 70 on sheet 73 (opening brief, 119; reply brief, 62).

Here counsel admits the overcharge and says appellant should not complain because the trial court

gave it credit for the duplicated time. This matter of having received credit for the duplication was not the point of our criticism, which was that it is inconceivable that an error of this magnitude could appear in the time cards of the men, and also in Putzar's independently kept hand book. To this criticism counsel remains mute.

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(5) Sept. 20. Sheet 73, Nelson night work (opening brief, 119; reply brief, 62).

Our criticism is that this foreman is allowed 26½ hours of actual work in one night. Appellee's reply is that Nelson worked 8½ hours at *night* (Sheet 80) and that 4 hours overtime shown on Sheet 80, and the 14 hours overtime shown on Sheet 78, were *overtime day work.*

In the first place, Nelson was the *night foreman,* and nothing in the record suggests that he did anything in the day time. On the contrary his own testimony clearly points to night work only (IV, 1185, 1186). Secondly, counsel's attempted explanation, while being entirely gratuitous, is based on an assumption that Curtis's copy work is inaccurate, for both Sheets 78 and 80 show on their face that the 14 and 4 hours respectively of overtime were for work *"all performed in one night."*

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(6) Sept. 21. P. McUrney, No. 150 (opening brief, 120; reply brief, 63).

Our criticism is that appellant is charged with *20 hours* straight time and 8 hours overtime in one day.

the reply is again characteristic as being based on matter not appearing in the record: "The men worked 10 hours on the 21st *during the day* and worked for *13 hours that night,* making a total of *23 hours.*" The time sheets do not show any night work on the 21st of September. Furthermore, if we should adopt counsel's suggestion and put the 10 hours into the overtime column, we have this result: 8½ hours straight time and *18* hours overtime (not 13), or a total of actual work of 26½ hours on September 21st. Counsel will have to explain again.

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(6) Sept. 21. J. Finson, No. 190 (opening brief, 120; reply brief, 63).

Our criticism is that appellant is charged with *22* hours straight time in one day. Counsel's explanation is entirely outside the record, and we regret therefore our inability to discuss it.

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(6) Sept. 21. William Eader, No. 212 (opening brief, 120; reply brief, 63).

Our criticism is that appellant is charged with *14 hours* of straight time in one day. Again counsel's explanation is gratuitous and unintelligible.

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(6) August 28. F. Paoli, No. 176 (opening brief, 120; reply brief, 64).

Our criticism is that appellant is charged with *18 hours* of straight time in one day. Again counsel explains outside the record.

(6) Sept. 14. W. Schmidt, No. 318 (opening brief, 120; reply brief, 64).

Our criticism is that as this workman is allowed 10 hours of straight time, and 16 hours of overtime, appellant is called upon to pay for the obviously impossible, namely: 24½ hours of actual work performed in one day. To this counsel makes an "explanation" agreeing with our criticism precisely, but mars somewhat the harmony by attributing to appellant the *"mistake of not doubling the overtime"*. We will have to leave it to counsel to further explain what is meant by this.

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(6) Sept. 14. Workmen Nos. 355, 517, 536 (opening brief, 120; reply brief, 64).

Our criticism is that it seems almost incredible that a workman can put in *23½ hours of actual work* in one day. Appellee's reply is that there are times when one man has worked *"as much as 48 hours actual time"*, and then Curtis is appealed to for confirmation. He says: *"I have seen men work three consecutive days without sleep"* (V, 1573). We still express our scepticism. However, if Curtis is right, we wonder what kind of work a man is doing at the end of the 48 hours—is it such as should be counted as a part of the legal proof of the reasonable value of the completed work?

(6) Sunday, Sept. 12. C. Schmidt, No. 355 (opening brief, 121; reply brief, 65).

Our criticism is that it seems almost incredible that this workman could have worked on Sept. 12th 17

hours, Sept. 13th 23½ hours, and Sept. 14th 23½ hours of *continuous actual work.* Counsel's reply is: "Nothing unusual".

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(6) Sept. 20. H. Nelson (opening brief, 121; reply brief, 65).

This criticism, through an inadvertence, is a duplication of the criticism made under No. 5 at pp. 119 and 120 of our brief and, though answered by appellee, it needs no further reply from us.

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(6) Sept. 20. Workman No. 516 (opening brief, 121; reply brief, 65).

Our criticism is that appellant is charged with 14 hours of straight time in one day. Counsel's explanation is again characteristic as being entirely outside the record.

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(6) Sept. 20. Workmen Nos. 375, 570, 505, 567, 568 and 513 (opening brief, 121; reply brief, 66).

Our criticism is that appellant is being called upon to pay for time obviously impossible, namely: *24½ hours of actual work in one day.* Counsel's reply is along the same harmonious line of agreement as in the case of "Sept. 14, William Schmidt, No. 318",

except that instead of marring the harmony, as done under that heading, by attributing to appellant a "mistake in not doubling the overtime", he says that there is *"nothing unusual"* in our criticism, that is, nothing unusual in a man working 24½ hours in one day.

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(7) Charges for ladders, floors, floor plates (opening brief, 121, 122; reply brief, 66, 67).

Our criticism is that the charges are covered by contract Schedule 5 of the libel (I, 37). Counsel's reply is a denial. The limits of this reply brief will not justify a further discussion of the matter which would necessarily be long.

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(8) Francis Dolan, foreman pattern maker (opening brief, 122; reply brief, 67-68).

Our criticism is that if Dolan and his men did work on the ship, and Putzar was keeping an independent record, such record would show the time of Dolan and his men and, therefore, appear on the time sheets. Counsel's answer is that the *"major portion"* (gratuitous) of the work of the pattern makers was in the shop, they had always been considered shop men and their record kept solely in the shop. That is just the point. Their cards, *although* doing work on the ship which Putzar should have kept track of, were never turned over to Putzar as ship cards, and, therefore, they are not to be found on his time sheets.

This reply brief has extended to a length not dreamed of when it was commenced, and we shall hasten its close by reference to but two other matters, omitting an answer to the several small matters contained at pp. 68 to 73 of reply brief referred to at pp. 127 to 130 of our opening brief.

Counsel's frequent references to libelant's Exhibit Schedule No. 2 (VII, 2688) in attempting to discredit Klitgaard is, we think, fully met by Klitgaard himself in his redirect examination found in VI, 2001-2012.

Running Power House at Night.

(Opening brief, 130; reply brief, 73.)

Our criticism was that Schedule 1 shows an overcharge of 6.9 days of 15½ hours each at $1.50 per hour, and in making it, we requested that counsel explain the trial court's ground of refusing to recognize this overcharge. This counsel does not do, but instead advances a new theory that the charge of 30.9 days for *"running power house at night"* (see Schedule 1, I, 31) covers time when the power house was run in the *day time,* offering the further gratuitous suggestion that light is furnished to the ship not because it is night time, but because the hold of the ship is dark both day and night, and whether it be day or night light must be furnished therefor. This *day time* contention will be seen to be a direct refutation of the wording of appellee's own bill: *"Running power house at night"*. The evidence

offered in this case, if properly offered, is intended to meet the issue made by the pleadings. In this particular instance the sole issue is the charge for "running power house *at night*".

The evidence, as bearing on *this* issue, consists, as we view the matter, of Putzar's time sheets showing the number of nights work was done on the "Hilonian", and Ferro, the night power house engineer's testimony as showing the number of hours on those nights the power house was run for the "Hilonian". Ferro testified that his was night work running the engine that furnished the lights for the ship (IV, 1310), and on cross examination we find this:

> Q. You are quite clear, are you, Mr. Ferro, that when work at nights ceased on the ship then your work ceased in the power house?
>
> A. Yes, sir.
>
> (IV, 1325.)

In our opening brief on this subject we were not particular in our statement of the *exact* number of hours the power house was run at night, but we shall now furnish that *exact detail.*

Putzar's time sheets show that night work was done on the "Hilonian" on the following days only: 8 days in August (24th to 31st, both inclusive), and 18 days in September (1st to 8th, both inclusive, 10th to 18th, both inclusive, and the 20th), or 26 days in all (mistakenly stated in our opening brief as 24 days). Turning now to Ferro's time cards covering 25 of these days, and Linde's card of Sept. 4th covering the night that Ferro was absent, we find, *including the bonus*

half hour paid to the engineer when he was not working, the time shown by these cards to be 390½ hours. Three of these cards also show that the power house was run in the joint interests of the "Hilonian" and another ship, yet the "Hilonian" in each instance is charged *full 15 hours,* and we presume the other ship also. (Cards of Aug. 26th, str. "Plant", 15 hours; Aug. 27th, str. "Plant", 12 hours; Aug. 31st, str. "Buckman", 14 hours).

Another interesting feature is disclosed by an examination of Ferro's cards, and that is that appellant has been charged with this *night* engineer's *services* for running the power house at night on *Sept. 9th, 19th and 21st,* days on which *no night work* is shown by Putzar's time sheets to have been done on the ship, and the aggregate of the hours so improperly charged is 90. Counsel would meet this showing not only by going outside the record and claiming that the bill for running power house at night includes running it in the day time, but further digresses by referring to Appendix 1, pp. 50 and 51. We have said that we declined to examine this appendix but, when we read counsel's reference to it under this heading, we relented with the result that we find it is impossible to tell from what counsel has taken the data placed on these pages. Certainly not from anything in the record unless from Ferro's time cards, and, if from these, then the data are incorrect, as for instance: Ferro's cards of Aug. 26th, 27th, 31st, and Sept. 1st and 3rd, when compared with the showing made covering the same dates on p. 50 of the

appendix, show gross inaccuracy. If this criticism is well taken what can be said of the balance of Appendix I? Before dropping this subject, we also wish to call the court's attention to the provision of the specifications, requiring the appellee to furnish the lights used on the ship *free;* in other words, as a part of the contract price for the repairs (VII, 2642).

David Doig's Time Cards.

(Opening brief, 130; reply brief, 73.)

The defense which is intended to meet our attack on these cards is no more remarkable than many others which we have pointed out, except its futility is a shade more apparent. Although it is not stated in so many words, appellee's only possible defense of them necessarily depends upon an extension of the hearsay rule to limits never before heard of. We do not refer to the defense contained in the reply brief, for that is so palpably refuted by a simple reference to the evidence referred to that, in oral argument, counsel avoided reference to it and rested upon the assertion that the propriety of the cards as part of the record was made manifest through the *"clerk's" endorsement* found on their back. In other words, this endorsement is the warrant for the cards' introduction as proof of David Doig's time. Appellee is, therefore, showing as part proof of the reasonable value of this work several hundred of hours of time by the mere introduction of unidentified memoranda,

the correctness of which depends solely upon the unsupported statement of the memoranda itself.

Furthermore, we cannot pass unchallenged the basis upon which counsel's defense of these cards rests. It is said they bear the endorsement of the clerk as evidence of their introduction. This statement is not correct, and is further indicative of the desperate straits to which counsel is put in defense of this incident. Every word of testimony in this case was taken before a commissioner. We make no point of distinction between such commissioner and the clerk as regards the power of endorsement of exhibits properly *offered.* Nor do we raise any question as to the endorsement of the other exhibits in this case where the record *shows them to have been offered in evidence.* However, we do contend that in this case not a single exhibit contains the endorsement of either clerk or commissioner. Through the courtesy of the commissioner, and to meet the convenience of counsel and witnesses, all the hearings were had at the offices of respective counsel in the Merchants Exchange Building, and the method pursued was to have the commissioner attend such of the hearings as was necessary for the purpose of swearing the witnesses, sometimes as many as half a dozen being sworn at a time, after which the commissioner would retire. If, in the course of a witness's examination, exhibits were offered by either party, the then acting *stenographer* would place upon such its appropriate mark of designation.

These David Doig cards were certainly not offered in evidence *before* David Doig testified, and they were certainly not offered at any time *afterwards,* for David Doig's *evidence* showed that the testimony of the time-keeper, Sjoberg, in whose handwriting the cards are, *was the necessary prerequisite to their introduction,* and Sjoberg was never called.

As counsel does not contend that their presence in the record is a mistake or an inadvertence, the only alternative left is to await his showing of the volume and page of the record where these cards were introduced. At the close of the oral argument this was what counsel told the court he would do and we shall await with interest his performance in that respect.

We submit in conclusion that the appellant has clearly proved a contract in this case, and that hence appellee cannot recover on a quantum meruit under its proof, no segregation of the contract and quantum meruit work having been made. Even, however, if there was no contract, we submit that appellee's quantum meruit proof is deficient in so many respects as to leave the court no alternative but to take appellant's figure of $22,922.56 as the sole possible basis of recovery.

Respectfully submitted,

E. B. McClanahan,
S. H. Derby,
Proctors for Appellant.